The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude

Arthur E. Bonfield
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In this Article, the author explores the "potentialities long dormant" in article IV, section 4, of the United States Constitution under which "both Congress and the courts were endowed with tremendous power." The potentialities to which Mr. Bonfield refers are the attainment and advancement, as well as the protection, of the individual's political and civil rights. While the fourteenth amendment has done much to advance these goals, only the guarantee clause, argues the author, can compensate for the deficiencies inherent in the fourteenth amendment. By using contemporary values to define the term "republican," the author urges the Supreme Court to re-evaluate its position, taken in past cases, that all issues raised under article IV, section 4, are nonjusticiable. After a thorough historical analysis of the guarantee clause, the author concludes that its appropriate use would cure the deficiencies of the fourteenth amendment and thus insure the fuller realization for all Americans of those basic precepts upon which our society rests.

Arthur E. Bonfield*

INTRODUCTION

Article IV, section 4, of the United States Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." While the latter parts of this provision have been adequately explored,¹ no comprehensive consideration of the potentialities long dormant in the first clause has ever been under-

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taken. This is unfortunate, since under this portion of our fundamental law, both Congress and the courts were endowed with tremendous power.

The hypothesis to be tested in this article is that the first clause of section 4 has not been completely displaced by later additions to the Constitution. As a result, it still exists as an independent and untapped source of federal power, by which the central government can assure the fuller realization of our society's democratic goals. The fourteenth amendment, which was adopted 80 years subsequent to the guarantee, has only partially met that task. This has been due to several serious deficiencies in its application to deprivations of political and civil rights.

First, that amendment requires "state action" as a requisite for its successful invocation. Although the amount of state participation necessary to constitute such action has been substantially diminished in recent years, the requirement still stands as a significant bar to the amendment's use in a multitude of situations. Second, save for rare instances, the fourteenth amendment has been deemed to effect solely a negative limitation on state action. That is, it has never been construed to impose any extensive affirmative obligations on state or local government. Its third defect is an inability to cope with nondiscriminatory, though perhaps overly restrictive requirements on the ballot. This is somewhat related to


3. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (state action present in the refusal to serve Negroes by a restaurant operated on premises leased from a state agency); Barrows v. Jackson, 346 U.S. 249 (1953) (state action present if a court enforces, or awards damages for, breach of restrictive racial covenant); Shelley v. Kraemer, 334 U.S. 1 (1948). The expansion of state action is presently one of the most dynamic areas of fourteenth amendment law.

4. This occurs in cases where the connection between the state and individual, group, or business discrimination is insufficient to warrant a finding of state action. E.g., state incorporation has not been thought sufficient in itself to prevent such a corporation from refusing to hire Negroes. The Civil Rights Cases, 109 U.S. 3 (1883). See also Lewis, The Meaning of State Action, 60 COLUM. L. REV. 1083 (1960).

5. In cases where the police failed to protect people against mob violence, see Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). See also United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953).

6. For example, the obligation to see that one group of citizens does not conspire to deprive another group of citizens of an equal opportunity to obtain the minimum requisites deemed essential to life in contemporary America, such as decent housing, employment and education.

its last disability, which is the amendment's seeming inapplicability to structure of state government.\(^8\)

While it is arguable that the fourteenth amendment could eventually encompass some of the situations presently deemed beyond its scope, it is unlikely that it could deal with all of them, or that it will be construed to do so in the foreseeable future. But the guarantee can cure these deficiencies, and do so with less doctrinal discomfiture than would be engendered by such an attempt under the fourteenth amendment.

To demonstrate the validity of this proposition, resort will be had to the history of section 4. This will include a survey of the effect of the fourteenth amendment on its development. Only through such an analysis can we understand the function of the guarantee, and the extent to which it still retains the great potential with which it was invested. For as aptly put by one author, commenting on the method of constitutional construction often utilized by the Court:

> The original understanding forms the starting link in the chain of continuity which is a source of the Court's authority, and it is not unnatural that appeals to it should recur as consistently as they do. Happily, finding the original understanding . . . is, at best, "not a mechanical exercise but a function of statecraft" and of historical insight.\(^9\)

> And what is relevant is not alone the origin of constitutional provisions, but also "the line of their growth," the further links in the chain of continuity.\(^10\) This being so and our law not being given to following hard and fast theoretical formulations on questions of . . . [broad scope], it is possible, . . . for historical materials to cast some light although they are inconclusive and although, in any event, the clock cannot be turned back.\(^11\)

And of course, in tracing the "line of a provision's growth," congressional usage should be studied as much as judicial pronouncement, for the legislature is also engaged in making constitutional law.\(^12\) But the importance of background and subsequent growth having been demonstrated, care should then be taken to note that

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8. One extreme example would be the probable inapplicability of the fourteenth amendment to a situation where a state's government was altered to provide that one house of its legislature should be hereditary, appointive, or have life tenure.

9. Citing Frankfurter, Mr. Justice Holmes and the Supreme Court 76 (1938).


when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered . . . "We must never forget that it is a constitution we are expounding." The history and development of the guarantee clause must therefore be examined in light of both the plan of government of which it forms a constituent part and the needs of a twentieth century America.

Such a study reveals the contemporary significance of that provision. For it demonstrates that despite the growth of federal power under various sections of our Constitution, only the guarantee clause can compensate for the deficiencies of the fourteenth amendment. As such, it has a tremendous potential to assure the fuller realization of our societal goals, chief among which is the protection and advancement of all citizen's political and civil rights. The justification for this conclusion will be drawn from a consideration of the adoption and subsequent history of section 4. The latter will be examined in light of a growing and amended federal constitution, which orders a progressive and ever changing society.

I. "THE ORIGINAL UNDERSTANDING"

The Federal Constitutional Convention held its first session in Philadelphia on May 25, 1787. During the next four months, 55 delegates from 12 states, most of whom belonged to the wealthier and more conservative classes, drafted the fundamental framework of our nation. Most of them were in substantial agreement as to

the ultimate objectives to be sought by their endeavor. They hoped to create an effective central government, strong enough to deal both with matters of national concern and with matters beyond state competence. By the creation of such a government they hoped to insure stability and order, safeguard the "fundamental rights of man," and foster economic growth. How to attain this objective was the problem on which they concentrated.

It was recognized that popular sentiment was in favor of state's rights, and that therefore their proposals would have little chance of acceptance unless they were tailored to that philosophy. Accordingly, most of the convention felt that Hamilton's position was too extreme. He asserted that such an effective national government was impossible unless state sovereignty was wholly abolished. What was necessary, the delegates thought, was to devise a federal system in which sovereignty could be divided between the nation and the states, with various guarantees and restrictions placed on each in their own sphere. In this way a compromise was sought to insure state's rights within a strong national union.

Being convinced that unfettered, majority rule could endanger property rights and destroy wise and enlightened leadership, the delegates sought to limit it. They believed that "the evils under which the U. S. laboured" were due to "the turbulence and follies of democracy," and that "some check therefore was to be sought for agst. this tendency of our Governments." And while their primary motive was to provide "for the security of private rights, and the steady dispensation of Justice," an equal concern was directed at protecting "the minority of the opulent against the majority."

These statements should not be misinterpreted because on the whole the delegates wished to limit majority rule but not destroy it. Their fear of popular tyranny or democratic folly did not induce a preference for authoritarian government. On the contrary, recent experience with England led to an overwhelming rejection of such an alternative. What was needed, they thought, was a compromise between majority rule and minority rights. With this general background, a more precise analysis of the adoption of article IV, section 4, may be attempted.

That the central authority should guarantee to each of the states a republican form of government seems to have been one of the

17. Id. at 51 (Randolph). See also Gerry to the same effect. Id. at 48.
18. Id. at 134, 431 (Madison).
19. Note the presence of some such provision in every one of the early and proposed drafts of the Constitution. Id. at 231; 3 Farrand 56, 630.
well defined purposes of the convention. This probably resulted from the absence of a similar guarantee in the Articles of Confederation, which omission was considered one of its greatest defects. Such a provision was also considered essential in that "all the governments of the states in the Union ought to be of the same nature—of the republican kind; and that the general government ought to be an assemblage of the spirit and principles of them all." The first measure introduced to implement these convictions was "that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State." Soon after, Madison moved to substitute "The republican constitutions and the existing laws of each state, to be guaranteed by the United States." Randolph favored this because he was convinced that the national union had to be founded on republican principles, and that no state should be able to become a monarchy.

Although the substitution was agreed to, it was followed by a new resolution, "Resolved that a republican constitution, and its existing laws, ought to be guarantied to each State by the United States." Gouverneur Morris was dissatisfied with this resolution, commenting that he was unwilling to guarantee the laws of Rhode Island. Mr. Wilson then maintained that its purpose was to secure the states against insurrections and rebellions. But Randolph insisted that the resolution had two objects. It was directed first at insuring the maintenance of republican government in every state, and second, at suppressing domestic commotions. He urged the necessity of both provisions.

It was then moved to displace the prior measures with "the Constitutional authority of the states shall be guaranteed to them respectively agst. domestic as well as foreign violence." Mr. Houston objected, fearing the perpetuation of existing state constitutions. He noted that Georgia’s Constitution was unsatisfactory, and that there would be difficulties inherent in the Federal Government’s intervention between contending parties, each of whom

20. THE FEDERALIST No. 21 (Hamilton).
21. 2 ELLIOT'S DEBATES 126 (1891) [hereinafter cited as ELLIOT].
22. 1 FARRAND 22 (Randolph). Similar proposals were made on June 5th and June 11th. Id. at 121, 194, 202.
23. Id. at 206.
24. Id. at 227, 231, 237.
25. 2 FARRAND 47.
26. Ibid.
27. Id. at 47–48.
would claim the sanction of the Constitution. Another delegate then insisted that the national government had to be able to quell rebellions. If it could not, a tyrant might gain control of one state, and then seek to subvert all the others, while the central authority would be "compelled to remain an inactive witness of its own destruction."

A motion was then made to amend the suggested substitute with the words "'and that no State be at liberty to form any other than a Republican Govt.'" While Madison seconded this motion, Rutledge felt it unnecessary, since he was convinced that Congress already had the authority to cooperate with the states in subduing any rebellion. Wilson then proposed "as a better expression of the idea, 'that a Republican form of Governmt. shall be guaranteed to each State & that each State shall be protected agst. foreign & domestic violence.'" This proposal being well received, the previous proposals were withdrawn, and the substitute adopted. It was then referred to one of the working committees of the convention, the Committee of Detail.

The Committee's notes state that the guarantee was "(1) to prevent the establishment of any government, not republican (2) to protect each state against internal commotion and (3) against external invasion." It appeared in the Committee's report as, "The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence." Through further committee action, the first clause was modified to read, "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." In that form, with but minor changes to the later clauses, it was adopted by the convention for submission to the states.

There was comparatively little discussion of section 4 in the state conventions. In Massachusetts, however, one of the delegates questioned the meaning of Congress guaranteeing a republican form of government. Why didn't they just say outright, he inquired, that Congress would guarantee the state's constitution? This was answered by the assertion that Congress only meant to guarantee a form of government, since a guarantee of the states' present constitutions would be undesirable. As actually framed the guar-

28. *Id.* at 48.
29. *Id.* at 48–49.
30. *Id.* at 148.
31. *Id.* at 188.
32. *Id.* at 662.
33. 2 *ELLIOT* 101 (Singletary and Thompson).
34. Since it would preclude any future alterations. *Id.* at 101 (King).
antee would permit each state to choose such form of republican government as it deemed best, with Congress insuring its protection.  

A more detailed explanation was made of the provision in the North Carolina ratifying convention. James Iredell maintained that the meaning of the guaranty provided was this: There being thirteen governments confederated upon a republican principle, it was essential to the existence and harmony of the confederacy that each should be a republican government, and that no state should have a right to establish an aristocracy or monarchy. That clause was therefore inserted to prevent any state from establishing any government but a republican one. Every one must be convinced of the mischief that would ensue, if any state had a right to change its government to a monarchy. If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. . . . It is, then, necessary that the members of a confederacy should have similar governments. But consistently with this restriction, the states may make what change in their own governments they think proper.  

Out of convention, The Federalist papers insisted that without the guarantee, "A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union. . . ." After noting the consequences that might ensue from its absence, an answer was provided for the fear that section 4 would permit "officious interference in the domestic concerns of the members." It was that the first clause could be no impediment to reforms of state constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished, for the guarantee could only operate on changes to be effected by violence. But there was an admission that it "would be as much directed against the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community." In the same series of articles, James Madison also proclaimed:

In a Confederacy founded on republican principle, and composed of republican members, the superintending Government ought clearly to

35. Id. at 168 (Stillman).
36. 4 Elliot 195. James Iredell was soon to become a justice of the U.S. Supreme Court.
37. These papers had relatively little influence in determining the issue of ratification. They were a campaign document, written primarily for New York state, and were therefore probably unduly slanted towards state's rights. 1 Crosskey, Politics and the Constitution 8-11 (1953); The Federalist Papers, at x (Mod. Lib. ed. 1941).
38. The Federalist No. 21, at 125-26 (Ford ed. 1898) (Hamilton).
39. Ibid.
40. Ibid. Hamilton's claim that the guarantee would only apply to
possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into should be substantially maintained.

But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms, have been found less adapted to a Federal coalition of any sort, than those of a kindred nature. . . .

It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alteration in the State Governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question, it may be answered, that if the General Government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so. . . . The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions: a restriction which, it is presumed, will hardly be considered as a grievance. 41

By way of contrast, another staunch federalist maintained that the guarantee

secures to us the full enjoyment of every thing which freemen hold dear, and provides for protecting us against every thing which they can dread. . . .

Does not the abovementioned section provide for the establishment of a free government in all the states? And if that freedom is encroached upon, will not the constitution be violated? It certainly will; and its violators be hurled from the seat of power, and arraigned before a tribunal where impartial justice will no doubt preside, to answer for their high-handed crime. 42

changes by violence would seem a bit exaggerated especially in light of his contention that it would operate against the usurpation of rulers. Furthermore, note the strong state's rights audience for which it was written. See note 37 supra, as well as his own predilection for an extremely strong central government. See note 16 supra. Note also the specific references in the Convention to the guarantee of a republican government as a separable proposition from the guarantee against domestic insurrection. See notes 26, 30 supra. See also U.S. Const. art. 4, § 4.

41. THE FEDERALIST No. 43, at 287–88 (Ford ed. 1898) (Madison).
42. Cassius XI, The Massachusetts Gazette, Dec. 25, 1787. Printed in
From the prior discussion of the guarantee's genesis, certain generalities may tentatively be ventured about the intentions of those who authored and approved it. Their purpose was to "guarantee" to each state, as a separate and independent proposition, a republican form of government. This was to prevent the creation by any means, whether peaceful or otherwise, of aristocratic, monarchical or despotic state governments. They hoped to achieve this objective by assuring sufficient national intervention to "guarantee" state republicanism.

Thus section 4 was to contain three separate and independent propositions, which, while roughly related to each other, would stand separately and have independent spheres of application. In a few instances just noted, this factor was somewhat blurred by a tendency to discuss all of section 4 as an entity. The weight of the evidence, however, makes the conclusion reached virtually unassailable.

The "founding fathers" insisted on the guarantee clause as a means of protecting the welfare and safety of the Union. That is, they deemed substantial uniformity of the states' governments with each other, as well as with the national government, a requisite to successful union. This notion came from Montesquieu, who greatly influenced contemporary American political thinking. He maintained that two kinds of governments could not successfully exist, side by side, in a "confederate republic," and that a confederate government ought, therefore, to be composed of states of the same type of government, preferably of the republican kind. The republican form of government clause was an attempt to implement this conviction and was viewed as such by its framers and champions.

With these general conclusions disposed of, a more detailed analysis of the contemporary meaning and construction of the guarantee clause will be attempted. What, in precise terms, did the provision mean? How would the Supreme Court have construed the clause in the decade after its adoption? Probably the most ef-

43. 2 Elliot 126; The Federalist No. 43, at 287 (Ford ed. 1898) (Madison). See also text accompanying notes 35, 41 supra.
44. 2 Elliot 126; The Federalist No. 39, at 246-47 (Ford ed. 1898) (Madison).
45. The Federalist Nos. 9 & 43, at 51-52, 287 (Ford ed. 1898) (Hamilton and Madison). Montesquieu's views on this very point are noted in the former.
efficient way to approach this problem is to dissect the clause, word by word, and apply contemporary materials to their analysis.

The provision's opening, "The United States shall," provides the only instance where the government by its corporate name is given a duty. The Court would therefore have been faced with the question as to which branch or branches of the Federal Government were bound to perform its mandate. Obviously the words "The United States shall" (the word "shall" being mandatory) do not in themselves designate any particular arm of the government as the responsible agency. Rather, they intimate that the obligation rests on all the departments of the government, in their appropriate spheres.

This conclusion seems especially persuasive when it is recalled that the guarantee clause was not placed in articles I, II, or III, which prescribe the respective powers and duties of each branch of the government. Instead, it was located in a separate and later article of the Constitution. This being so, the Supreme Court would probably have concluded that the judiciary was as fully empowered to enforce the obligation as was Congress.

The term "guarantee," which describes the national government's obligation, is not found in legal dictionaries before 1800. However, it is found in the 1786 edition of Dr. Samuel Johnson's "Dictionary of the English Language." "To guarantee" is defined as "to undertake to secure the performance of any articles." The word "to secure" is defined as "to make certain, to make safe, to protect, to put out of hazard." The clause may therefore be rephrased as, "The United States shall undertake to make certain, make safe, protect, put out of hazard republican forms of government in each state."

It is interesting to note that the 1783 edition of Dr. Johnson's Dictionary defines "to guarantee" as "to undertake to see that stipulations are performed." Because the definition was somewhat modified between the two editions, it is presumed the change was made in favor of more accuracy. The later addition of the word "secure," with its correlative definitions of "making safe and certain, protecting and putting out of hazard," therefore seems significant.

As a result, contemporary usage of the word "guarantee," would have empowered the United States to take measures that would protect, as well as restore, republican government. The central authority was not to be a passive observer while a state headed toward
autocracy. It could take all measures reasonably necessary to avoid such a catastrophe. Section 4 would thus have sanctioned affirmative national action to organize and preserve republican government.

Other factors militating in favor of this conclusion would have been persuasive. Could it have rationally been concluded that the United States was to be a passive observer of state deterioration? As previously noted, substantive uniformity among the states, and between them and the national government, was deemed essential to the Union's safety. Would not it therefore be foolish to have the superintending power limited so that it could intervene only when it was too late? And in any obligation to restore, must not there be implied a power to preserve? This common sense approach, when combined with the contemporary definition of the term "guarantee," would almost certainly have secured a judicial construction sanctioning national action to maintain republican government.

But who was the beneficiary of this guarantee? The provision says "every state." Would a contemporary court have interpreted this to mean "state government," as opposed to the people in their individual capacity? The absurdity of such a construction would have become apparent. For what protection would the state government need against its own action? Protection against others is afforded by the latter clauses of section 4. To be meaningful, therefore, the Court could only have concluded that it was intended as a guarantee to the people of every state, for only they would benefit by such a provision.

This construction would not only have appealed to the Court's logic, but also would have been demanded by contemporary usage. In eighteenth century America, "state" had a variety of meanings. It could either connote "the territory," "the government," or "the people" of a nation. Since it was used most frequently as a synonym for "the people of a state," the Court would naturally have been predisposed to adopt that meaning in any construction of section 4. When coupled with the fact that the less usual definitions would have led to an irrational interpretation of the provision, it may be concluded that they would have been rejected. In this connection, it should be noted that only eight years after the Constitutional Convention, Justice Iredell declared that he could not fathom a distinction between a "state" and its "people."49

A contemporary court would therefore have construed the guarantee as imposing an obligation on the United States to protect

48. 1 Crosskey, Politics and the Constitution 55-69 (1953). Mr. Crosskey presents an extended analysis demonstrating this and cites numerous sources.

49. Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 93 (1795).
the people in their individual capacity from unrepublican governance. And it is unlikely that it would have deemed this obligation to apply only to a majority, since the framers clearly desired to protect the minority against the majority, as well as the majority against the minority. As Madison said in the tenth Federalist:

Give all the power to the many, and they will oppress the few. Give all the power to the few, and they will oppress the many. Both ought, therefore, to have the power that each may defend itself against the other.50

As a result, every individual would be the beneficiary of the guarantee. Each would therefore be entitled to its fulfilment, even against the will of a majority of his fellow citizens.

But was this protection limited to statewide governance only? Or would it apply as well to local government? A contemporary court would have realized that an application of the guarantee clause solely to state government would have been inconsistent with the mandate of section 4. This is true because section 4 assured the people that they would be governed in a republican manner.51 And, of course, they are as much subject to the control of local government in its proper sphere, as they are to state government. Therefore if the clause was construed solely to apply to statewide government, it could easily be circumvented by the delegation to autonomous political subdivisions of plenary state powers.

As a result, the Court would probably have deemed the provision's protection to extend to local government. For it would have been both absurd and inconsistent with section 4 to secure republican governance state wide and, at the same time, permit despotic rule locally.

A contemporary court would have limited the guarantee's protection solely to those areas incorporated within the Union. For its language is clear. It assures republican governance only to those residing in the states, and not to those living in the territories or possessions.

The meaning of the word "republican" would have been crucial to any contemporary judicial analysis of this provision. For in order to evolve a meaningful construction, its substance had to be clearly defined.

50. THE FEDERALIST No. 10 (Madison).
51. Since "state" meant "people of a state," § 4's language was clearly applicable to all government, state or local. While no federal court has held to the contrary, numerous state courts have insisted that the guarantee does not apply to political subdivisions such as cities, towns, or counties. See Annot., 67 A.L.R. 737, 741 (1930); 11 AM. JUR. Constitutional Law § 48 nn.4, 5, 6 (1937); 50 L.R.A. 198; U.S.C.A. Const. art. 4, § 4. These seem almost certainly in error.
Both during the Constitutional Convention and the debate that followed, several definitions of the term republican were ventured. It was maintained by some that the fundamental principle of a republic was that the majority govern and that the minority comply. Patrick Henry was equally convinced that its essence was the delegation of power to an adequate number of representatives, with an unimpeded reversion back to the people at short periods through elections. And though some contended that a republic was a system where the people at large, either collectively or by representation, formed the legislature, Alexander Hamilton did not hesitate to remark that those most tenacious of republicanism, were as loud as any in denouncing the evils of democracy.

Considerable time was spent on the definition of “republican” in the Federalist. In the tenth Federalist Madison asserts that a republic is a government in which the scheme of representation takes place by the delegation of powers to a small number of citizens elected by the rest. In Federalist No. 39, he attempts a more comprehensive definition; he notes specifically that a republic is

a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . . It is sufficient for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified . . . . According to the Constitution of every State in the Union, some or other of the officers of the Government, are appointed indirectly only by the people.

On comparing the Constitution planned by the Convention, with the standard here fixed, we perceive at once, that it is, in the most rigid sense, conformable to it.

And during the Constitutional Convention, Madison had also remarked that the right of suffrage was “one of the fundamental articles of republican Government,” which could as easily be destroyed by limiting those capable of being elected, as those authorized to elect. Thomas Jefferson, though not a member of

53. 3 Elliot 396.
54. 4 Elliot 328 (Pinckney).
55. 1 Farrand 288.
56. The Federalist No. 10, at 60 (Ford ed. 1898) (Madison).
58. 2 Farrand 203, 250.
the Constitutional Convention, also had some views on this subject. He felt that a republic was a government by its citizens en masse, acting directly and personally according to rules established by the majority. Though he maintained that a government was more or less republican, as it had this ingredient of direct action, he concluded that the nearest it could be approached in a country the size of the United States, was by the delegation of power to representatives chosen by the people. These would serve for such short times as would ensure their continued obedience to their masters. Jefferson's conclusion was that governments were republican to the extent they had this element of popular election and control.

The 1786 edition of Samuel Johnson's Dictionary defined "Republican" as "Placing the government in the people," and "Repullick" as "a state in which the power is lodged in more than one." The author of the final draft of section 4, envisioned its chief attributes as the peoples' ownership of ultimate power. Also worthy of note is the fact that during the period after the Constitution's adoption, it was the Republican party that advocated keeping the government as close to the people as possible.

Only ten years after the federal convention, the Supreme Court maintained that state legislatures were not endowed with absolute powers. As republican governments they could not pass ex post facto laws, impair the obligation of contracts, make a man the judge of his own cause, or take property from A and give it to B. The Court was partially interpreting the word republican in light of article I, section 10, of the federal constitution. That is, the specific prohibitions it imposed on the states were construed as republican requisites to republican government. This, despite the fact that no such provision existed in the state's own constitution. What is even more interesting is the fact that in this case the Court found the concept of natural justice to be an inherent limitation on all republican government. This is attested to by the fact that no contemporary federal constitutional provision barred a state from taking A's property and giving it to B, or making a man a judge of his own cause. The importance of natural justice as a limi-
tation on such government is further illustrated by the Court's insistence that no man could be compelled to do what the laws do not require; nor to refrain from acts which the laws permit . . . . [For] there are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of [state] legislative power . . . [such as an effort to] take away that security for personal liberty, or private property, for the protection whereof the government was established. 65

Since the concept of natural justice tends to expand and contract with the era in which one lives, republican government was therefore to be defined in light of contemporary values, as well as the condition of the federal constitution.

The past summary of late eighteenth century thought indicates the equation of republican government with that which derived its powers from the will of the people. This would be demonstrated by their control, possibly immediate, through actual participation, but more likely remote, through periodically elected representatives chosen by the "great body" of the people. 66 Further, such government was deemed limited, i.e., its powers were circumscribed by natural justice and fundamental law. Post Revolutionary War thought would therefore have equated a republic with limited government, governing with the consent of those whose society it ordered.

While this generalization would have been an excellent guide, the Court would have had to devise a more comprehensive and particularized interpretation. This, to determine the precise limitations and responsibility to which such government had to adhere. Only then could the Court measure the validity of a particular facet of state government, or review the legitimacy of congressional action pursuant to section 4.

A variety of theories might have been considered in evolving a more detailed picture of "republican" government. High on any such list would have been a reference to the state governments dictated by natural justice. See also text accompanying note 86 infra.

65. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). Note that aside from § 4, no contemporary constitutional provision enforced these limitations on the states. But if they were deemed by the Court as requisites to "free republican governments" it would most probably have applied them to the states by virtue of the guarantee's mandate. Also of extreme importance is the Court's clear intimation that all republican government has an affirmative obligation to protect its citizens' rights from any source of infringement.

in existence at the time of the Constitution's adoption. Contemporary courts would probably have concluded that they were all consistent with the standard embodied in section 4. As a result, as long as those "republican forms" were maintained, late eighteenth century courts would almost certainly have found them free from defect.

During the decade after the Constitution's adoption the Supreme Court would, therefore, have solved any question arising under the guarantee clause by resort to contemporary theories of natural justice, and the condition of the state governments in 1787. So long as there was substantial conformity to both, a state would have been deemed republican. This being so, it would be worthwhile to briefly examine post Revolutionary War state governments.

The governments of all the states were theoretically grounded on popular sovereignty, i.e., the source of all power was the people, and the government ruled by their consent. As a result, they were all limited in their powers. Each recognized that there were certain fundamental rights upon which no government could trespass. All therefore had some sort of bill of rights, generally with provisions somewhat similar to many of the first ten amendments to the federal constitution. These, however, did not preclude the almost universal imposition of property, religious, sex or race qualifications on holding office or voting. The norm therefore was that the voters and office holders were the wealthy minority. The normal organization of the state governments was in three departments, with an elected bicameral legislature, the basis of whose apportionment varied. Such apportionments were, however, likely to be grounded on taxable inhabitants, electors, white population, property, state subdivisions, or combinations thereof. Governors were generally elected by the state legislature, but often by the electors.

It would be solely to this standard then, and likely little more, that the courts or Congress could have forced the states to adhere to in the decade after the Constitution's adoption. Contemporary thought was not likely to have deemed the prevailing state governments un-republican, and the still living authors of section 4 had probably not intended to alter them.

67. But see text accompanying notes 25 & 27 supra. Note also that Wilson, the "framer" of the clause, maintained that Georgia had a republican government. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793). Would the states have ratified a Constitution that altered their government?

68. 1 Thorpe, A Constitutional History of the American People 1776-1850, at 60-100 (1898).
A contemporary court would have had little difficulty in rejecting the contention that a state's government could be aristocratic in spirit and substance, so long as it was republican in "form." It would have seemed inconceivable that the provision was intended to impose an obligation solely of sham. What would be the purpose of a guarantee of mere "form" or structure, if a government's essence could be despotic? The word "form" must therefore have been intended to include "substance." It was used in this clause, as would have been apparent to a court, to mean "kind" or "sort," rather than "form" as opposed to "substance." Such a construction would have been clearly warranted, both in terms of the purpose of section 4, and one of the contemporary definitions of the word "form."

The analysis of the guarantee clause in light of contemporary materials demonstrates that it endowed the federal government with great power which was to be used to preserve republican government. As such, it was the only part of the Constitution that afforded the people any general protection against abuses in their state governance. And as previously noted, such a check in the hands of the central authority was deemed essential to the continued welfare of the Union.

Having outlined the origin and intended function of the guarantee clause, and its probable contemporaneous construction, an attempt will be made to trace its subsequent significance in American history. The culmination of such a survey will reveal the remaining vitality of this provision in our constitutional jurisprudence.

II. "THE LINE OF ITS GROWTH"

The period of American history from the turn of the century to the Civil War, a span of about 60 years, was characterized by relative self-satisfaction due to a steadily expanding economy, an open frontier, and the slow but sure growth of democracy. As a result there was little need, or pressure, for the federal government to protect citizens' rights against abusive state governance. The temper of the times would have made the exercise of such powers not only generally unnecessary but also, on the whole, unwelcome.

This picture was appreciably marred only by the increasing tension over the slavery issue, which manifested itself in a gener-

69. JOHNSON, DICTIONARY (1786) defined "form" to mean a "particular model," "stated method," or "prescribed mode." The adoption of the other contemporary definition, "external appearance, without the essential qualities, empty show," would have obviously rendered the provision pointless.
al struggle over state’s rights. Despite this, no branch of the federal government was forced to assume responsibilities that would have necessitated its resort to the guarantee. And only rarely was any appreciable effort expended on an attempt to interpose the central authority between a state and its citizens, to prevent an alleged “usurpation of power” or infringement of “rights.” But since the slavery issue engendered the most feelings during this period, it is not surprising that it furnished the first opportunity for any serious discussion of section 4. During the debates on Missouri’s admission to the Union, battle lines over its free or slave status formed along divergent interpretations of the guarantee.

The abolitionist segment of Congress felt most strongly that

the existence of slavery in any State is . . . a departure from republican principles. . . . It cannot be denied that slaves are men, (and therefore) it follows that they are, in a purely republican government, born free and are entitled to liberty and the pursuit of happiness. They justified their attempt to prohibit slavery in Missouri by maintaining that the guarantee clause obligated Congress to do so.

The southerners successfully resisted, decrying the equation of slavery with unrepublican government. They insisted that section 4 was directed solely against violence and usurpation. As far as they could see, it provided no authority to interfere in the formation of a state’s government, whose prior existence was presupposed by the guarantee clause.

These conflicting constructions were refought in Congress several times before the Civil War, always in the context of the struggle over slavery. The abolitionists insisted that the guarantee clause empowered Congress to “dictate the form of [a state’s] fundamental code or constitution, with a view of rendering it consistent with . . . [a republican] form of government.” They were convinced that such a government secured the rights of “life, liberty, and the pursuit of happiness,” and was founded on the assumption

70. 1818–1821.
71. 33 Annals of Cong. 1180 (1820) (Fuller). See 35 Annals of Cong. 1039 (1820) (Cragin); 150 (Morrill); 279 (Ruggles); 338 (Roberts).
72. See, e.g., 35 Annals of Cong. 150 (1820) (Morrill); as to the obligation of Congress to act.
73. 3 Stat. 645 (1821).
74. 33 Annals of Cong. 1196 (1820) (Scott); (15th Cong. 2d sess.).
36 Annals of Cong. 1338 (1820) (Rankin); 1028–29 (Reid); 411 (Pinckney).
75. 35 Annals of Cong. 413 (1820) (Pinckney).
76. 36 Annals of Cong. 1338 (1820) (Rankin).
77. 12 Cong. Deb. 4269 (1836) [covering 1824–1837] (Hard).
that "all men are created equal," and that "government derives its just powers from the consent of the governed."78 Therefore, any government making distinctions between races was unrepublican.79

The southerners, in resisting any such construction of the guarantee clause, insisted that republican government meant only self-government, and that Congress was not empowered to meddle in the internal affairs of the states.80 As far as they could see, a state's admission to the Union conclusively established its republicanism. From this, they deduced that no later change in its government could make it unrepublican so long as it did not deviate substantially from state government in 1787.81 Due to the southern dominance of Congress during this period, this view prevailed. As a result, section 4 was never used to safeguard "human rights" from state or other encroachment.82

One of the earliest and historically most significant judicial attempts to secure federal protection against abusive state governance was the 1833 case of Barron v. Baltimore.83 In that suit, lawyers for the plaintiff attempted to invoke the first eight amendments to the federal constitution as imposing substantive restrictions on the states. By this tactic, counsel sought to force the federal judiciary to save his client from allegedly abusive state governance. Mr. Chief Justice Marshall rejected such a role for the federal government. He maintained:

Had Congress [by enacting the first eight amendments] engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.84

Having seemingly precluded any national protection against state oppression, the Court was to find itself under mounting pres-
sure for the remainder of the period. As a result, it was impelled to reaffirm its inability to interfere in such matters via the first eight amendments. But further than that, it had to face the new contention that the guarantee clause bestowed such power on the federal government. While such a view probably had little popular support, it did have a poorly articulated and somewhat uncertain emergence in the judicial arena as an alternative to Marshall’s position in Barron v. Baltimore.

By 1848, a state supreme court had construed the guarantee clause as a bar to the use of the initiative and referendum. The court maintained:

The nature and spirit of our republican form of government; the purpose for which the constitution was formed, which is to protect life, liberty, reputation and property, and the right of all men to attain objects suitable to their condition without injury by one to another; to secure impartial administration of justice; and generally, the peace, safety and happiness of society, have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass... [A]n act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government.

The most significant thing about this case was its insistence that republican government was limited by “the plainest principles of natural justice.” This, of course, was reminiscent of the similar view espoused by the United States Supreme Court 50 years earlier. As a result it may be a fair assumption that this state court also viewed the standard imposed by section 4 as dynamic, changing in accord with contemporary notions of natural justice. However, what is most significant about this early case, is its insistence that section 4 was a bar to absolute state power.

Only a year later, the United States Supreme Court entertained the case of Luther v. Borden, which arose out of Dorr’s Rebellion of 1841. At that time, the 1633 Charter of Rhode Island and Providence Plantations, which provided for extremely limited suffrage and had “no mode of proceeding... by which amendments could be made,” was still in force. Disfranchised malcon-
tents, exasperated with this state of affairs and in defiance of the "Charter Government," took the initiative and elected a constitutional convention by universal manhood suffrage. The convention drafted the foundation for a new government which was subsequently adopted by a majority of the adult male population. Under Governor-elect Dorr, an attempt was made to uphold its authority by force of arms, but after a few skirmishes with the "Charter Government," the new government was abandoned.

The case which developed out of this incident was an action of trespass brought by Martin Luther against Luther Borden and others. The defendants maintained that the "Charter Government" had declared martial law due to the insurrection just described. After further alleging that Luther had been involved in the insurrection, defendants concluded that as members of the militia they had rightfully broken into his house to arrest him. Luther answered by contending that prior to the alleged trespass the "Charter Government," under whose authority Borden had acted, had been displaced and annulled by the people of Rhode Island. Therefore, his actions at that time were in support of the lawful authority of the state, while Borden was in arms against it.9

Thus, the sole question presented in Luther v. Borden was which of the two governments was legitimate and lawful.90 The Court declined to resolve this issue on the ground that it was a political question and therefore beyond the competence of the judiciary.91 That holding was grounded on the fact that the latter clauses of article IV, section 4, and a statute enacted in 1795,92 conferred on the President exclusive powers in this regard. He was to curb insurrection by calling forth the militia on application of the proper governmental authority of a state. As a result, the obligation had been impliedly placed on him to "determine what body of men constitute the legislature, and who is the governor, before he can act." While the President never actually summoned the militia, he did recognize the old governor as the executive power of Rhode Island. Further, he took measures to send the militia to his aid if it should be found necessary. "[N]o court of the United States, with a knowledge of this decision, [the President's recognition of the old governor] would have been justified in recognizing the opposing party as the lawful government."93

The foregoing detailed and somewhat exhaustive analysis of

89. 48 U.S. (7 How.) at 34–35.
90. Id. at 38–39, 46.
91. Id. at 46–47.
93. 48 U.S. (7 How.) at 44.
Luther v. Borden was necessitated by the extremely heavy reliance placed on it by future cases. They have maintained that it forever barred the federal judiciary from using the guarantee clause to protect citizens against unrepublican state governance.

The holding of the case, however, was merely that Congress or the President had the sole power to determine which of two contending state governments is legitimate. That decision was beyond the jurisdiction of the courts, and one by which they were bound. The notion that Luther held all questions arising under the guarantee nonjusticiable stems from its unfortunate dicta:

Under . . . [U.S. Const. art. 4, § 4] it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

Ostensibly, the Court's motivation for this conclusion, as well as the case's specific holding, was that

if this Court is authorized to enter upon this inquiry . . . and it should be decided that the charter government had no legal existence during the period of time . . . [when it managed the State] if it had been annulled by the adoption of the opposing government,—[or presumably had been declared unrepublican], then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

94. Luther did not rest on the fact that questions arising under the guarantee clause were political. Field, The Doctrine of Political Questions In The Federal Courts, 8 Minn. L. Rev. 485, 507 (1924). Taylor v. Beckham, 178 U.S. 548, 578 (1900), interprets the case's holding in the same manner as does the text here.

95. 48 U.S. (7 How.) at 46.

96. Id. at 42. Cited in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 143 (1912), as holding and authority which it was bound to follow.
When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.97

Interestingly enough, Daniel Webster, in arguing the case for Borden, actively urged the Court that Congress had given sanction to the old "Charter Government" by admitting it to the union. He insisted that the Constitution was grounded on the theory that all the states were republican.98 His apparent description of the general attributes of such a government were that

the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impractical, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of the laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions.99

Not long after Luther, Mr. Justice Curtis remarked that the perpetuation of republican governments in the states as guaranteed by article IV was essential to the continued welfare of the nation.100 Inadvertent as it may have been, this was a harbinger of the great struggle soon to ensue.

During this period then, from the decade after the Constitution's adoption to the Civil War, the guarantee was almost totally disregarded. Though enforced once in a state court, the only lastingly significant attention paid it was in Luther's dictum. As previously noted, this was not unsurprising in light of contemporary social, economic and political conditions. They conducd to a lack

98. 6 WORKS OF WEBSTER 231-32 (1853). Note again in this connection that the republicanism of Rhode Island was questioned in the Federal Constitutional Convention. See note 25 supra.
99. 6 WORKS OF WEBSTER 217, 221 (1853), quoted in In re Duncan, 139 U.S. 449, 461 (1891); and Taylor v. Beckham, 178 U.S. 548, 579 (1900).
of urgency for any substantial federal intervention on behalf of citizens suffering from abusive state governance.

Conditions changed, however, as the end of this period approached. The slavery question, with its concomitant issue of state's rights, created great pressure for federal intervention in the previously "internal affairs" of a state. There was a large movement to cure what was deemed a particularly abusive exercise of state power, \textit{i.e.}, the legal sanctification of slavery. No doubt, also, that pressure was directed at securing substantive uniformity among the state governments, since "this government cannot endure permanently half slave and half free."\footnote{101}

Not unsurprisingly, however, there was no attempt to force the judiciary to any determination that the institution of slavery was unrepublican.\footnote{102} First, such a case would have been too politically charged for the Court to handle. Second, even assuming such a suit were entertained on the merits, it would have gone the way of \textit{Dred Scott}.\footnote{103} That is, the Court, and not solely because of its membership, would most certainly have deemed slavery "republican." Most persuasive would have been the severe consequences of the Court's invalidation of an institution coextensive with the nation's young history, championed and sanctioned by half the states and their population, and the backbone of a substantial part of the nation's economy.

Because of these factors it became obvious that a satisfactory solution of the slavery issue would be difficult to find. It was not completely unexpected, therefore, when the tensions engendered by the continual conflict it evoked finally vented themselves in Civil War. That War not only left great parts of the South battered and in ruins, but also left it at the mercy of the northern "radical republicans." Not content with the abolition of slavery by the thirteenth amendment,\footnote{104} those men decided to insure the rights

\begin{itemize}
\item \footnote{101}{\textsc{Bartlett, Familiar Quotations} 537b (13th ed. 1955) (Speech of Abraham Lincoln, June 16, 1858). Though in 1787 some states were slave and some free, this difference in state governance did not become a serious threat to the Union's safety until the period before the Civil War. As noted previously, § 4 was intended to secure this substantive uniformity.}
\item \footnote{102}{The political impossibility of any congressional action under this clause to abolish slavery \textit{in the states} was obvious.}
\item \footnote{103}{\textit{Scott v. Sandford}, 60 U.S. (19 How.) 393 (1857). That case held that Negroes were not "people of the United States" and could not claim the privileges and immunities of such citizens. Therefore, a slave brought into a free state did not thereby gain his freedom.}
\item \footnote{104}{The Emancipation Proclamation theoretically freed all slaves in the insurgent states on January 1, 1863. The thirteenth amendment became effective on December 18, 1865. Substantial uniformity among the states was therefore achieved by constitutional amendment rather than by resort to the guarantee clause.}
\end{itemize}
of the newly freed Negro by reordering the southern governments. While not adverse to pushing aside legal obstacles, they did seek refuge for their plan in constitutional dialectics.

The earliest attempt to utilize section 4 as authority to “reconstruct” the southern states was the Wade-Davis bill of 1864. Though passed by Congress “to guarantee . . . certain states a republican form of government,” it was never enacted due to a pocket veto by President Lincoln.\textsuperscript{105} It required a majority of a state’s electorate for the legal reconstitution of its government.\textsuperscript{106} One of the measure’s sponsors insisted that the guarantee clause vests in the Congress of the United States a plenary, supreme, unlimited political jurisdiction, paramount over courts, subject only to the judgment of the people of the United States, embracing within its scope every legislative measure necessary and proper to make it effectual; and what is necessary and proper the Constitution refers in the first place to our judgment, subject to no revision but that of the people. It recognizes . . . the judgment of no court . . .

[The guarantee] places in the hands of Congress the right to say what is and what is not . . . inconsistent . . . with the permanent continuance of republican government. . . .\textsuperscript{107}

While some people still insisted that slavery and republican government were compatible,\textsuperscript{108} they were now relegated to a minority.\textsuperscript{109} And although the Wade-Davis Bill was never enacted into law, it was the first congressional triumph for an expansive construction of the guarantee clause.

The Wade-Davis Bill was quickly followed by an unsuccessful attempt to bar Tennessee’s readmission to Congress on the grounds that it had deprived all Negroes of the ballot. The “radicals” were convinced that “whenever a man and his posterity are forever disfranchised from all participation in the government, that government is not republican in form.”\textsuperscript{110} But such failures under section 4—the Wade-Davis Bill and Tennessee’s readmission—were short lived.

One of the first measures enacted pursuant to the congressional

\textsuperscript{105} 2 Morrison & Commager, Growth of the American Republican 32 (1950); Cong. Globe, 38th Cong., 1st Sess. app. 82 (1864).
\textsuperscript{106} Cong. Globe, 38th Cong., 1st Sess. 3450 (1864) (Wade). The requirement of only 10% which Lincoln wanted was deemed unrepublican.
\textsuperscript{107} Cong. Globe, 38th Cong., 1st Sess. app. 82–83 (1864) (Davis).
\textsuperscript{109} See, e.g., Cong. Globe, 38th Cong., 1st Sess. 2104 (1864) (Boutwell).
\textsuperscript{110} Cong. Globe, 39th Cong., 1st Sess. 3976 (1866) (Boutwell). Boutwell also noted that while universal suffrage was not a requisite of republican government the great majority must have the ballot.
plan of "reconstruction" was the Civil Rights Bill. That measure, originating in the Senate on January 29, 1866, attempted to prevent any "discrimination in civil rights or immunities . . . on account of race, color or previous condition of slavery." The bill was sought to be justified constitutionally by resort to the newly ratified thirteenth amendment. There was much disagreement on this point, and many people were convinced that Congress had no power to prevent the states from discriminating against Negroes. President Johnson, concurring with this view, vetoed the bill. In spite of this, it was subsequently enacted into law.

However, many of the legislators were of the opinion that they were on shaky ground and therefore demanded a constitutional amendment that would secure for the Negroes not only civil rights, but also the franchise. The result was the fourteenth amendment, proposed to the states on June 13, 1866, but not ratified until over two years later. In the interim, on what constitutional basis could past as well as future congressional reconstruction be grounded?

The guarantee clause had been mentioned previously as a possible source of congressional power in this area. That it was not taken too seriously during the brief period after the defeat of the Wade-Davis Bill is attested to by the primary reliance on the thirteenth amendment. The doubts cast on this theory led to a reappraisal by the "radical republicans" of the constitutional basis on which they were proceeding. As a result, when the Committee on Reconstruction reported out the fourteenth amendment, it resurrected their prior reliance on article IV, section 4. It was from that provision, it concluded, that Congress derived the power to reconstruct the southern states and assure equal rights for all Negroes.

The Majority Report of the Committee maintained that it

112. Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (Trumbull); 298 (Stewart); 1124 (Cook).
113. Cong. Globe, 39th Cong., 1st Sess. 477 (Saulsbury); 1120 (Rogers); 1291 (Bingham); 1155 (Eldridge). See also James, The Framing of the Fourteenth Amendment 77 (1956).
114. 6 Richardson, A Compilation of the Messages and Papers of the Presidents 6 (405-11) (1909) (Veto message on the Civil Rights Bill maintaining its unconstitutionality).
was for Congress, not the President, to establish the relationship of the southern state governments to the union. This flowed from its duty to guarantee the several states a republican form of government. The actions of the President in reorganizing and recognizing several of the captured insurgent states' governments were therefore to be viewed as purely provisional. After reiterating that every state had to be republican, the majority concluded that virtually none of the southern governments could pass muster. As a result, before those states could be reinstated they would have to be brought into conformity with the mandate of section 4.

A minority of the Committee filed a dissent in which it maintained that the guarantee clause did not empower Congress to frame a state's constitution. They were convinced that section 4 was grounded on pre-existing republican government, which was still in force in the southern states. And, in their view, "to convert an obligation of guarantee into an authority to interfere in any way in the formation of the government to be guaranteed, is to do violence to the language."

But the majority of Congress proceeded on the basis of its own interpretation and commenced to enact a series of measures pursuant to its assumed powers under section 4. These acts divided the southern states into five military districts, each captained by a military commander. He would also control the existing state governments formed under Presidential order when the states were captured by federal forces. In addition, martial law was imposed and elections by universal male suffrage were provided for the convening of state constitutional conventions. New constitutions, after being ratified by a majority of those electing the delegates to the convention, and providing for the continuance of universal suffrage.

117. "Contemporary constitutional law was all with Congress," in the dispute as to who should control reconstruction. Corwin, The President, Office and Powers 324 (1957) citing Luther. Note that unlike the situation in the Luther case, there was no statute here empowering the President to implement a clause of art. 4, § 4.

118. The so-called "Reconstruction Acts." 14 Stat. 428 (1867), 15 Stat. 2, 30 (1867). The first of these notes states specifically in its preamble that its purpose is to restore republican government in the insurrectionary states. Note also the large number of other bills introduced in the 40th Congress, 1st Session (1867), that were specifically denominated as measures to enforce republican government on the southern states. See Cong. Globe, 40th Cong., 1st Sess. Index LVII, CX (1867). Similar bills were introduced in other sessions.

119. These governments set up under the President's auspices were fairly consistent in most respects with those the states had before the war. See, e.g., Rhodes, History of the U.S. 1866-72, at 11 (1928) as to the ballot.

120. Except for those disfranchised due to the rebellion, a number which became quite large.
suffrage, would be deemed sufficiently republican to entitle those states to their seats in Congress. However, before they would be seated they had to ratify the pending fourteenth amendment. These statutes were passed over a veto in which President Johnson maintained that rather than guaranteeing republican government in those states, Congress was wiping it out. And when all the former confederate states were readmitted to Congress after conforming to these conditions, they were readmitted with the express notation that they were now republican in form. At this time, section 4 was also used to prevent Nebraska from denying the ballot by reason of race or color.

Because of the variety of measures enacted by Congress pursuant to its expansive construction of the guarantee clause, it would seem worthwhile to examine its philosophy in greater detail. Even a year prior to the Report of the Joint Committee on Reconstruction, it was insisted that

\[ \textit{at the present time,} \underbrace{\text{under the words of the Constitution of the United States declaring that the United States shall guaranty to every State a republican form of government, it is the bounden duty of the United States by act of Congress to guaranty complete freedom to every citizen, and immunity from all oppression, and absolute equality before the law. No government that does not guaranty these things can be recognized as republican in form according to the theory of the Constitution of the United States. \ldots} \]

After the Committee's Report and during the debates on the Reconstruction Acts themselves, numerous other opinions were ex-

121. In many of the northern states the suffrage base was not yet as broad as that imposed on the South by these acts.
122. § 5, 14 Stat. 428 (1867). While the two later Reconstruction Acts modified this scheme somewhat, this was the basic form of what was named "Congressional Reconstruction."
124. 15 Stat. 72, 73 (1868); 16 Stat. 62, 80 (1870). Among the alleged requisites of republican government imposed on some of the states as a condition of their readmission was free public schooling for all citizens regardless of race. 16 Stat. 80–81 (1870); \textit{Cong. Globe}, 41st Cong., 2d Sess. 1255 (1870) (Morton). See discussions of the guarantee during the debates on the readmission of Mississippi and Virginia. \textit{Cong. Globe}, 41st Cong., 2d Sess. 1820 (1870).
125. As a condition of her admission as a state. 14 Stat. 391–92 (1867). That it was imposed under authority thought to derive from the guarantee clause, see Creswell, \textit{Cong. Globe}, 39th Cong., 2d Sess. app. 57–58 (1867). This was before the ratification of the fourteenth or fifteenth amendments.
126. \textit{Cong. Globe}, 38th Cong., 2d Sess. 1067 (1865) (Sumner). Italics are Globe's, it indicates a dynamic construction of "republican."
pressed on the meaning of section 4, and congressional powers thereunder. While some questioned the constitutionality of the action taken under that provision, the overwhelming majority were convinced of its propriety. They felt that these enactments insured the restoration of republican constitutions in the southern states. And as far as they could see, the means by which they chose to enforce the guarantee were beyond reproach so long as their ultimate objectives were proper.

As to the substance of the republican governments they deemed themselves bound to create, a number sufficient to implement their conviction insisted that something close to universal suffrage was a fundamental requisite. A minority resisted any such suggestion, contending that consistent with republican principles, a state could limit suffrage as it pleased.

definitions advance ... [T]he definition of a republican form of government, which was perhaps contemplated when that clause was put into the Constitution, is not now regarded as a definition of a republican form of government either in the Constitution or out of it.

... [T]o have a republican form of government now there must be no slavery, there must be equal civil rights, there must be protection to all, there must be no taking of life, liberty, or property without due process of law.

127. E.g., Cong. Globe, 39th Cong., 2d Sess. 1333 (1867) (Finck); 1451 (Saulsbury); app. 86 (Rogers).
128. Cong. Globe, 39th Cong., 2d Sess. 1207 (1867) (Boutwell); 1364, 1366 (Stewart); 1212 (Bingham); 1173 (Shellabarger).
130. See Reconstruction Acts and the requirements of universal suffrage they imposed, note 118 supra; see also Cong. Globe, 39th Cong., 2d Sess. 350 (1867) (Broomall); app. 57 (Creswell); 450 (Bingham); 472 (Boutwell); 1290 (Mercur); notes 105 and 110 all considered Negro suffrage a minimum requisite, while many went much further.
132. Cong. Globe, 41st Cong., 2d Sess. 1255 (1867) (Morton); 1253 (Howard); and note 125 supra. Thus intimating that a republican government has certain affirmative obligations.
133. Cong. Globe, 41st Cong., 2d Sess. 1254 (1870) (Morton). See also Cong. Globe, 39th Cong., 2d Sess. 1290 (1867) (Mercur). The latter noted that in any construction of the standard imposed by § 4, the "genius, ruling ideas, progress, and existing sentiments of the great masses of the people" must be accorded great deference.
It should be noted that this assertion was reminiscent of many earlier intimations. For the content of "republican" government was to be dictated not only by the changed condition of the federal constitution, but also by the prevailing theories of natural justice.

A later critic of this view maintained:

What was a republican form of government when the Constitution was formed would be a republican form of government now, for the Constitution has not changed in that respect. The same meaning that that provision had when it first went into force is the meaning which it has now. Subsequent events cannot change that meaning, and therefore what was a republican form of government when the Constitution was adopted by the American people, and went into operation in 1789, is, in contemplation of that instrument, a republican form of government now.134

However, those of this view were a minority, the bulk of Congress envisioning themselves as acting pursuant to the clause's mandate. They felt that

by the national Constitution, the nation is bound to assure a republican government to all the States, thus giving to Congress the plenary power to fix the definition of such a government; but by the Declaration of Independence, the fundamental elements of this very definition are supplied in terms from which there can be no appeal. By this Declaration it is solemnly announced, first, that all men are equal in rights; and, secondly, that just government stands only on the consent of the governed. . . . Whenever Congress is called to maintain a republican government, it must be according to these universal, irreversible principles. The power to maintain necessarily implies all ancillary powers of prevention and precaution, so that republican government may be assured. . . . It is for Congress to determine, in its discretion, how republican government shall be maintained. Whatever it does in this regard, whether by general law, or by condition or limitation on States, is plainly constitutional beyond all question. All is in the discretion of Congress, which may select the "means" by which this great guarantee shall be performed.135

As might be expected, legislation born of such sentiment was soon brought to test in the Supreme Court. In Mississippi v. Johnson,136 the Court refused to pass on the validity of these enactments, viewing the issue presented as a political question.137

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134. CONG. GLOBE, 41st Cong., 2d Sess. 1218 (1870) (Thurman); see also Dunning, Constitution of the U.S. in Civil War and Reconstruction 122 (1885); 2 Story, Constitution of U.S. 567-68 n.1 (4th ed. 1873), quoting Johnson.
135. CONG. GLOBE, 41st Cong., 2d Sess. 1358 (1870) (Sumner); see also CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (Sumner).
136. 71 U.S. (4 Wall.) 475 (1866).
137. This was dismissed on the grounds that a suit against the President
membering the *Dred Scott* decision and its aftermath, the Court evidently decided that discretion was the better part of valor.

Soon after, however, the case of *Texas v. White*,¹³⁸ gave the Court an opportunity to comment upon the Reconstruction Acts vis-à-vis Congress’ power under the guarantee clause. In that case, the provisional government of Texas sought an injunction in the Supreme Court to repossess certain bonds. The defendant maintained that since the plaintiff had severed relations with the union, it was no longer a state and therefore could not bring suit in the Supreme Court. The Court held that jurisdiction was present because the suit was instituted by the proper authority, and the rebel states had never left the Union. In doing so, it noted specifically that it was not pronouncing judgment on the constitutionality of the Reconstruction Acts.¹³⁹

The Court said, however, that the power to re-establish the rights of the Confederate states in the Union stemmed from the guarantee to every state of a republican form of government.¹⁴⁰ Furthermore,

> the new freemen necessarily became part of the people, and the people still constituted the state. . . . And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty. . . .

> In the exercise of the power conferred by the guarantee clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.¹⁴¹

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¹³⁸. 74 U.S. (7 Wall.) 700 (1869).
¹³⁹. *Id.* at 731.
¹⁴⁰. *Id.* at 727–28.
¹⁴¹. *Id.* at 728–29 (dictum). This passage indicates that under this provision, the United States was to have the power to act affirmatively. The word “guarantee” conferred broad powers to effectuate the provision’s purposes. *Dunning, Constitution of the U.S. in Civil War and Reconstruction* 120 (1885) disagreed, but admitted that the decision in *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), sanctioned it.
After outlining the steps the President had taken in each state under his powers as Commander in Chief, the Court continued:

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. . . . [Quoting Luther v. Borden.]

. . . And, we think [that principle] . . . may be applied [here] . . . though [that principle is] necessarily limited to cases where the rightful government is thus subverted [by revolutionary violence], or in imminent danger of being overthrown by an opposing government, set up by force within the State.142

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. . . . [Congress proceeded] to adopt various measures for reorganization and restoration. These measures . . . have been so far carried into effect, that a majority of the States . . . have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."143

This language, as previously noted, was dicta. The strict holding of this portion of the case was only that a state does not need a republican form of government in order to maintain suit in the Supreme Court.144

The Court's opinion in Texas v. White also casts some light on the proper construction of the word "state" as it appears in the first clause of section 4. The Court noted that it is not difficult to see that in all the senses in which the word is used,

the primary conception is that of a people or community. The people, [whether dwelling in a particular physical area,] . . . and whether organized under a regular government, [or not,] . . . constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our country are established.145

Thus, while in the Constitution the term "state" is most often used to express the combined idea of people, territory, and government, it has been used in this separate and divisible sense. In article IV's guarantee to the states it was used in the sense of the people as distinguished from a government.146

Not long after the Texas case the Supreme Court remarked by way of dicta that the propriety of the recognition of the recon-

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142. In other words in cases where there is no violence Congress does not have exclusive power.
143. 74 U.S. (7 Wall.) 700, 730–31 (1869) (dictum).
145. 74 U.S. (7 Wall.) 700, 720 (1869).
146. Id. at 721.
structed governments was a political question. Citing the *Luther*
decision, it maintained that such a "case is clearly one in which
the judicial is bound to follow the action of the political depart-
ment of the government, and is concluded by it."147

So closes the era of Civil War and congressional reconstruction.
A critic of the role played by the guarantee clause during this pe-
riod maintained:

Never till the days of reconstruction was it suspected that our system
recognized in any power outside the people of a state, the authority to
organize a government for the state. That the judiciary established a
view so entirely repugnant to all established precedent, is significant of
the embarrassments with which eras of political violence must always
surround the department closely bound to the past.148

But the words of Charles Sumner may be a more lastingly signifi-
cant comment on the provision's growth. He concluded:

It is a clause which is like a sleeping giant in the Constitution, never
until this recent war awakened, but now it comes forward with a
giant's power. . . . There is no clause which gives to Congress
such supreme power over the States as that clause.149

Regardless of the possible extremity of such a view, it is clear that
Congress used section 4 to great advantage during Reconstruction.
In appraising the significance of this usage the setting from which it
emerged should not be ignored. By the same token, that setting
should not be allowed to prejudice the issues.

The most impressive thing about congressional usage of the
guarantee clause during "Reconstruction" was its successful ap-
plication as a bar to abusive state governance. It temporarily en-
abled the national government to secure the rights of a large min-
ority and insure responsible state government. The legitimacy of
such action under section 4 seems amply demonstrated by its prior
history. For it was intended to assure that quantum of responsible
government and those rights of our citizens which would be re-
quired by contemporary notions of natural justice. And the fact
that during Reconstruction, Congress may have gone too far in
seeking to achieve these objectives, does not militate against the
significance of its precedent.

The major issue dividing the protagonists over section 4 power
was the content to be accorded the term "republican." That is,
while most contemporaries agreed that the guarantee clause em-

RECONSTRUCTION 120 (1885).
149. CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (Sumner).
powered Congress to save the people from "unrepublican" government, they strongly disagreed on the definition of that term and the lengths to which Congress could go to correct deficiencies.

The radicals were first disturbed at the institution of slavery. But they soon found themselves advocating equal political and civil rights for all citizens as a minimum requisite of republican government. They were convinced that if any state were found deficient in this respect Congress could cure it in any way it chose. On the other hand, the South, joined by the less radical northerners, insisted that the guarantee imposed no such requirements. They stressed the condition of the state governments in 1787 as the sole and unvarying standard by which to test a state's republicanism. Further, they were convinced that even if a state was defective, there were limits on the ways Congress could correct it.

As previously noted, however, the southern view was doomed to defeat in Congress. And the Court, after reaffirming the legislature's general powers under section 4, and noting that it had discretion in the choice of the means used to enforce it, studiously avoided any judgment as to the constitutionality of Reconstruction. The final appraisal of that issue belonged to history. But the future potential of this clause as a necessary bulwark against "abusive" state action was not likely to go unheeded.

However, a new factor was interjected into this scene. It will be recalled that the fourteenth amendment was ratified too late to have been of any service during the crucial period of Reconstruction. One of its purposes was to provide an alternative source of power for congressional action that seemed somewhat dubious constitutionally. But when the fourteenth amendment was first proposed to Congress in 1866, the guarantee was "discovered" as a similar pre-existing source of such authority. Nevertheless, the subsequent ratification of the later amendment was to have a profound effect on the future development of section 4.111 For that addition to the Constitution offered the federal government, in relatively clear and unambiguous terms, much of the power it was thought to possess under the guarantee clause.

Two eminent historians of our era maintain that the fourteenth amendment

threw the protection of the Federal Government around the rights of
life, liberty, and property which might be invaded by the states,
[thus] reversing the traditional relationships between these govern-

150. Note also the ratification of the fifteenth amendment on February 3, 1870. CORWIN, CONSTITUTION OF THE UNITED STATES OF AMERICAN 47 n.g (1953).
ments which had from the very beginning distinguished our federal system.151

Though this statement is accurate insofar as it described the de facto obligations assumed by the national government before the Civil War, the prior analysis of section 4 would seem to render it untenable as a matter of constitutional theory. And certainly in the most important period of Reconstruction, which took place before the fourteenth amendment’s ratification, this statement is inaccurate. For, as we have just noted, the guarantee was used successfully to attain much the same ends. Indeed, as a close reading of that clause would have indicated, it had a broader potential as a vehicle for securing citizens against abusive state governance than did the newly ratified proposition.

But the clarity and more particularized language of the fourteenth amendment, as compared with the more diffuse and generalized proposition embodied in article IV, was to be the latter’s undoing. For in choosing the provision that would justify federal protection against abusive state governance, this factor became crucial.

As a result, during the next 40 years, 1872 to 1912, the republican form of government clause received a mixed and uncertain reception. In the first case before the Supreme Court in which section 4 was raised as a counter to “abusive state governance,” counsel also pleaded the newly ratified fourteenth amendment. With fresh recollections of recent history, he seems to have been aware of the partial congruency of the two provisions. Though one provision was more specific than the other, both seemed directed at preventing certain abuses in state governance. Being unsure which was most suited to his purposes, counsel alleged each as a competing alternative.

In this particular case152 plaintiff brought suit to enforce her registration as an elector, notwithstanding her sex. After dismissing her right to such registration under the fourteenth amendment, the Court went on to consider the allegations under article IV. Nowhere questioning the justiciability of the issue presented, the Court concluded that it had to resort elsewhere to ascertain the meaning of “republican”:

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to

some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution. As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men, and now upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.\(^\text{153}\)

The Court felt this position was reinforced by the fact that none of the insurgent states readmitted to Congress as republican conferred the franchise on women.\(^\text{154}\)

Soon after holding that female disenfranchisement was not proscribed by either the guarantee clause or the fourteenth amendment, the Supreme Court entertained a case where seemingly only the latter provision had been pleaded.\(^\text{155}\) However, it did note that "the very idea of a government, republican in form, implies a right . . . to meet peacefully for consultation in respect to public affairs and to petition for a redress of grievances."\(^\text{156}\)

Also of particular interest was the characterization by the court of the fourteenth amendment. It was said to furnish an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . . [I]t secures "the individual from the arbitrary exercise of the powers of government, unrestrained by established principles of private rights and distributive justice."\(^\text{157}\)

Did not congressional Reconstruction under section 4 proceed on this basis? Further, wasn't this the very theory upon which that article was inserted into the Constitution? Recall the Supreme Court's earlier insistence that limitations of natural justice bound all republican government.

\(^{153}\) Id. at 175–76. Note that the constitution of Wyoming was attacked as unrepublican in 1890, because of its extension of suffrage to women. 21 Cong. Rec. 2666–68, 6582 (1890) (remarks of Representative Barnes and Senator Morgan).

\(^{154}\) 88 U.S. (21 Wall.) 162, 177 (1875).

\(^{155}\) United States v. Cruikshank, 92 U.S. 542 (1876).

\(^{156}\) Id. at 552 (dictum). Since the Federal Government before the recent growth of the fourteenth amendment could not prevent a state from infringing such rights, from where did they come if not by analogy to the first amendment's limitations on the United States? Isn't this an illustration of the Court's tendency to apply contemporary theories of natural justice to the word "republican"—or at least to force the state governments to adhere to the standards imposed on the United States.

\(^{157}\) 92 U.S. 542, 554 (1876).
This case was followed by a further effort to force the national government to curb abusive state governance. Again there was complementary pleading of both the fourteenth amendment and the guarantee clause. The Court noted that the rights of the people to choose their own government officials and pass their own laws through representative legislatures were protected by section 4. However, such rights were held not infringed by the state's determination of the binding effect of its own statutes.\footnote{158. \textit{In re} Duncan, 139 U.S. 449, 461–62 (1891).}

Within a year after that decision, Justice Field dissented from an opinion sanctioning federal intervention under the fourteenth amendment, to determine the eligibility of a candidate for office under a state's constitution.\footnote{159. Boyd v. Nebraska, 143 U.S. 135, 183–84 (1892). The guarantee clause was seemingly not argued in the case.} He was convinced that neither that amendment nor the guarantee clause was sufficient ground for the general government's interference in such a case. Mr. Justice Field freely acknowledged, however, that the latter provision authorized the central authority to intervene in the "administration of the affairs of the State," so far as necessary to secure republican government.

Just three years later, the Court was faced with a suit which seemed natural, in light of the Reconstruction episode, for the application of section 4. \textit{Plessy v. Ferguson}\footnote{160. 163 U.S. 537 (1896).} was an attempt to void a state's imposition on one class of its citizens, because of their race, of separate but equal accommodations in transportation. Counsel for the plaintiff restricted his argument to allegations of invalidity under the fourteenth amendment. His failure to utilize the guarantee clause was due either to oversight or to a fading view of that provision in light of the increasing use of the fourteenth amendment.\footnote{161. Its popularity is attested to by Justice Miller's comment in Davidson v. New Orleans, 96 U.S. 97, 104 (1878). See also 2 Warren, Supreme Court in United States History 598–99 (1932). Seventy cases were decided under it between 1873–1888. More significant, 725 cases were decided under it between 1888–1918.}

In a dissent to the majority's view that the fourteenth amendment in no way prohibited segregation, Justice Harlan insisted that the guarantee clause empowered Congress and the courts to void any regulation of civil rights on the basis of race.\footnote{162. 163 U.S. 537, 563–64 (1896).} Such a view lent further credence to the notion that "republican" was to be construed in light of contemporary theories of natural justice as well as the present state of the federal constitution.
In the following years, the Supreme Court held that article IV did not prevent the people of a state from giving to the courts full jurisdiction over the setting of municipal boundaries;\(^{163}\) would not permit the Supreme Court to review a decision of the highest court of a state, which sustained the determination of an election contest made by the general assembly under the authority of the state constitution;\(^{164}\) did not apply to territories and the conditions imposed thereon by Congress;\(^{165}\) was not, even assuming it applied to subdivisions of a state, inconsistent with the legislative creation and alteration of school districts;\(^{166}\) was the full limit of national control over the internal affairs of a state;\(^{167}\) could not justify the limitation of a state's power to subsequently alter the location of its capital.\(^{168}\) In all of these cases where plaintiff was seeking relief from alleged abusive state governance, reliance was primarily on the fourteenth amendment. Arguments for relief under section 4 were almost always subsidiary, but they were often entertained on the merits.

The accomplishments of the guarantee from 1872 to 1912 were, therefore, negligible and unimpressive. It was never successfully utilized to relieve that which was deemed abusive state governance. At the same time, the growing popularity of the fourteenth amendment as a platform from which to demand federal relief was obliterating any strong initiative on the part of plaintiffs to seek succor in section 4's broader language. The great accomplishments of the guarantee during Reconstruction seemed all but forgotten. And while the new amendment was a somewhat unsuccessful mode for federal intervention during the early part of this period,\(^{169}\) its

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\(^{163}\) Forsyth v. Hammond, 166 U.S. 506, 519 (1897).

\(^{164}\) Taylor v. Beckham, 178 U.S. 548, 579–80 (1900), relying on the Luther case. The Taylor case also maintained that the cornerstone of our republican institutions was the separation of powers doctrine. In 2 Curtis, History, Origin and Adoption of the Constitution 470 (1858), the author contends that the Constitution assumes in so many places that the states will have organized governments with three separate departments that it must be assumed that their continued existence is a requisite to republican government under art. 4, § 4.

\(^{165}\) Downes v. Bidwell, 182 U.S. 244, 279 (1901).


\(^{167}\) South Carolina v. United States, 199 U.S. 437, 454 (1905) (dictum). See also Elder v. Colorado ex rel. Badgley, 204 U.S. 85, 87–88 (1907) where the Court did not have to pass on the issue raised under the guarantee clause although it was argued.

\(^{168}\) In the act admitting it into the Union. Coyle v. Smith, 221 U.S. 559, 566–68 (1911). The Court also held that Congress did not have this power under its authority to admit new states. Recall the condition imposed on Nebraska's admission pursuant to this clause.

\(^{169}\) Congress ran into difficulty trying to legislate under it. See, e.g., Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 1962
growing success in some areas was further cause for the neglect of section 4.

But as a protector of most of their political and civil rights from abusive state action, plaintiffs during this era obtained relatively little relief from the fourteenth amendment. The pressure for federal intervention to secure these rights was so great, however, that the Supreme Court was continually forced to reassert the inapplicability of the Bill of Rights to the states. Only at the very end of this period was there any indication that the fourteenth amendment might encompass some of the basic rights found in the first eight amendments. However, because of its late arrival, such an indication did not seem too encouraging. Therefore, despite the growth of the fourteenth amendment, a broad area for the potential application of the guarantee clause still existed. The judiciary, by a restrictive interpretation of that amendment, had limited its utility as a vehicle for federal protection of civil and political rights. As a result, it could not yet insure the people, in any substantial fashion, against abusive and possibly unrepresentative state governance.

The guarantee clause, in the exercise of its yet undeveloped and pre-existing potential, was unscathed by any such judicial sterilization. Reason then might have dictated increasing resort to it, as the limitations of the fourteenth amendment became apparent. As has been noted, this was attempted with increasing frequency and a conspicuous lack of success towards the end of this period. But compared with the number and magnitude of the failures to ob-

629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876); see also United States v. Reese, 92 U.S. 214 (1876), on difficulty with the fifteenth amendment. Despite its broader and more general language, the guarantee clause was not argued as a source of congressional authority in any of these cases. The reason for this, especially in light of the then recent history, is more than unclear. Some important cases where the fourteenth amendment was unsuccessfully urged as grounds for federal intervention against what was deemed abusive state governance were: Plessy v. Ferguson, 163 U.S. 537 (1896); Davidson v. Illinois, 96 U.S. 97 (1878); Munn v. Illinois, 94 U.S. 113 (1877); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

170. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Smyth v. Ames, 169 U.S. 466 (1898); Chicago, M. St. P. Ry. v. Minnesota, 134 U.S. 418 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Ex parte Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). The later in the period we go, the more useful and successful it became. See note 161 supra as to the comparative volume of cases.


172. There were more than 20 such cases between 1877 and 1907. See Warren, supra note 171, at 436 & n.10.

tain such relief under the fourteenth amendment, the guarantee clause had not yet been given a chance. The latter's development into its preordained status as protector of the fundamental rights of all Americans seemed assured to begin. But a whole world of judicial embroidery would be needed before the outlines of this dormant power could emerge.

In 1912, however, in the case of *Pacific States Telephone and Telegraph Co. v. Oregon,* the Court provided posterity with a perfect example of the maxim that "hard cases make bad law." In 1902 Oregon had amended its constitution to provide for the initiative and referendum. By resort to the former, a law was enacted in 1906 imposing an annual license fee on telephone and telegraph companies. The Pacific States Telephone and Telegraph Corporation refused to comply. It maintained that the adoption and use of the initiative was unlawful in light of the first clause of article IV, section 4, and the first section of the fourteenth amendment. Therefore, it reasoned, any tax enacted thereunder did not have to be paid. Oregon thereupon commenced suit to enforce payment of the assessment and the statutory penalties for delinquency.

A more detailed analysis of defendants' contentions reveals that it urged that the guarantee was directed to the people, and each citizen, as well as to the states as political entities. It therefore prohibited the majority in any state from adopting an unrepresentative constitution. And in the minds of the framers, legislation by the people directly, in the form of the initiative, was an attribute of pure democracy and not a republic. Those attributes that they envisioned and perpetuated by the guarantee clause were three departments of government, with the legislative branch composed of representatives elected by the people.

The defendant concluded that the adoption of the initiative was therefore in violation of section 4, and justified its failure to pay the annual license fee enacted thereunder. As to the Court's jurisdiction to pass on the issues raised, defendant maintained that the Court had done so in the past, and the issue presented was justiciable. Further, the judiciary was not bound by Congress' decision in the matter, i.e., by its admitting and accrediting Oregon's Senators and Representatives. The State of Oregon countered to these assertions by venturing that the question presented was political

174. 223 U.S. 118 (1912).
175. The equal protection clause.
and, even if it was not, the framers did not intend to exclude direct legislation by the term "republican."\textsuperscript{177}

The Supreme Court responded to these conflicting views after holding that the arguments advanced under the fourteenth amendment were spurious and that plaintiff's sole objection was really that voiced under section 4.\textsuperscript{178} The Court concluded that the issues presented in the case were nonjusticiable, citing \textit{Luther v. Borden} as absolutely controlling.\textsuperscript{179} It thereby upheld the decision of the lower court that the corporation's defense was insufficient as a matter of law, and thus maintained the status quo. Though the opinion of the Court is replete with statements to the effect that \textit{all} questions arising under the guarantee clause are nonjusticiable, its holding may be more narrowly described.

That case held solely that a party could not assail the republicanism of a mode of statutory enactment by seeking to resist the enforcement of an act created thereunder. Stated another way, the Court will not entertain on the merits any suit where plaintiff is seeking to resist a statute's enforcement on the grounds of its unrepublican enactment. By this view, \textit{Pacific Telephone} did not hold that all questions arising under the guarantee clause were nonjusticiable.

Despite the availability of this narrow construction, subsequent courts have rejected it. They have maintained that \textit{Pacific Telephone} bars any resort to the judiciary for relief under the guarantee.\textsuperscript{180} For this reason, a more detailed analysis of the reasoning in that case becomes imperative.

The Court commences its discussion by asserting that the attack on the statute there involved proceeded

\begin{quote}
alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This be-
\end{quote}

\begin{footnotes}
178. 223 U.S. 118, 140 (1912).
179. \textit{Id.} at 143, 151.
180. Many state courts concur, most of them citing the \textit{Pacific Telephone} case. 16 C.J.S. \textit{Constitutional Law} § 145 n.69 (1956); 11 AM. JUR. \textit{Constitutional Law} § 47 nn.15 & 16 (1937). Other state courts have since held the provision not violated on its merits. \textit{E.g.}, Breedlove v. Sutliff, 183 Ga. 189, 188 S.E. 140 (1936); Borden v. Louisiana State Bd. of Educ., 168 La. 1006, 123 So. 655 (1929); Frankenstein v. Leonard, 134 Ohio St. 251, 16 N.E.2d 645 (1935); State \textit{ex rel.} Thomson v. Zimmerman, 264 Wis. 644, 60 N.W.2d 416 (1953). Even if the \textit{Pacific Telephone} case would bar federal courts from enforcing the guarantee, it does not bar state courts from doing so since the Supreme Court does not control state court jurisdiction. In enforcing it, a state court would be fulfilling the obligation imposed on the state to maintain such government. Allyn's Appeal, 81 Conn. 534, 71 Atl. 794 (1909).
\end{footnotes}
ing so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no government function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time, one and the same government which is republican in form and not of that character. 181

This would seem to be a rather inaccurate overstatement of the defendant corporation’s position. It contended not that the initiative destroyed the whole legal government of Oregon, but solely that the statute sought to be applied to it was void since it was enacted in an unrepublican manner. 182 This being so, the contention, if held to be sound, would necessarily affect the validity only of that particular statute, the provision by which it was enacted, and all other statutes enacted pursuant thereto. But it would in no way affect the validity of other acts of Oregon created in a republican manner.

But this severe consequence itself, if an accurate description of the results of any declaration of the invalidity of the initiative provision, might be deemed sufficient to render the question present-ed nonjusticiable. In the broad sense, this seems to be what was troubling the Court in *Pacific Telephone*. 183 Though only a handful of statutes could have been affected by a decision on the merits in that case, some future suit, prosecuted on that case’s authority, might bring drastic consequences. What the Court feared was a case where the invalidation of a statute on the grounds of its unrepublican enactment would effectively void all, or a substantial portion, of a state’s legislation. The results of such a holding would produce chaos and the demise of organized government. That being so, the Court would seem to have been justified in refusing to provide precedent that might lead to such results. By the very nature of the requested relief in *Pacific Telephone*, a decision invalidating the initiative provision would have voided all the statutes enacted thereunder. 184 For that reason, the holding of the case can be approved.

181. 223 U.S. 118, 141 (1912).
182. Id. at 137–39.
183. Id. at 141.
184. The Court could have avoided this consequence, however, by voiding the challenged mode of enactment *prospectively* only. This problem would not have arisen if the suit had been an attempt to enjoin the future operation of the initiative. In such a case the Court could have given relief to the plaintiff without the dangers inherent in the *Pacific Telephone* situation.
But following that case, one might have thought that the judicial enforcibility of the guarantee was an open question. Its holding was rather narrow, and the dangerous situation for judicial cognizance it presented was rather unique. Not every case attempting to enforce section 4 would threaten to obliterate all or a substantial portion of a state's legislation!

Since 1912, however, the Supreme Court has consistently refused to entertain on the merits any suit seeking to enforce the guarantee clause. On the basis of Pacific Telephone, it has denominated all issues raised under that clause nonjusticiable. This, without any full consideration of the justification for its action, or possible distinctions between the case before it and Pacific Telephone and Telegraph.

So the following challenges to constitutionality, to the extent they were grounded on the guarantee of republican government, have been deemed nonjusticiable; an attack on a provision of a state's constitution permitting voters of a municipality to resort to the initiative and referendum;¹⁸⁵ a challenge to a state judicial decision enjoining state officers from submitting a proposed constitution to the electors pursuant to an unconstitutional legislative act;¹⁸⁶ an attack on a statute delegating authority to an inferior court to form and manage drainage districts;¹⁸⁷ an attack on a state's referendum provision;¹⁸⁸ a challenge to a state's workmen's compensation act;¹⁸⁹ a challenge to a constitutional provision requiring the concurrence of all but one of the justices on the state supreme court to invalidate a statute, (except in affirmation of a judgment of the court of appeals);¹⁹⁰ an attack on an enactment imposing taxation for the purpose of supplying free school books to the children of the state;¹⁹¹ and an attack on a statute establishing a state commission to regulate the licensing, sales, prices and market areas of milk producers.¹⁹² In all these cases asserting the unrepublican nature of the measure challenged, the Court cited Pacific Telephone as justification for its refusal to pass on that issue.¹⁹³ As recently as 1946, it cited that case for the bald

¹⁹³. Such decisions were accompanied by little if any discussion of the
proposition that the guarantee of a republican form of government cannot be enforced in the courts.\textsuperscript{194}

During the period from the \textit{Pacific} case in 1912 to the present, the lower federal courts had varying views on section 4.\textsuperscript{195} However, none of them made any significant contribution. But worthy of note by way of considered executive action under the guarantee clause was President Roosevelt's brief consideration of its use to dispose of the Louisiana demagogue Huey Long. He was dissuaded, however, by the Justice Department's conviction that the provision was too ambiguous to be useful.\textsuperscript{196}

In the past 50 years some rather significant developments have occurred in the growth of the fourteenth amendment which might partially explain the Court's willingness to relinquish its powers under section 4. As noted previously, three years before \textit{Pacific Telephone} the Court intimated that the fourteenth amendment might be found to embody some of the guarantees contained in the Bill of Rights. While plaintiffs before that time were unsuccessful in obtaining any substantial relief from abusive state government, this announcement by the Court afforded some encouragement. It was not wholly unjustified. Due to the increasing pressure for federal intervention, the fourteenth amendment experienced a spectacular growth. It became the primary instrument for national protection against abusive and unrepublican state government.

Thus, as the Court discarded the guarantee clause as judicially unenforceable, it adopted and expanded the fourteenth amendment as a vehicle for achieving many of the same ends. Two illustrations of the great progress made by that provision during this period seem especially worthy of note. First, most of the important limitations on the federal government found in the Bill of Rights were incorporated into its due process clause.\textsuperscript{197} By that one stroke, the Court transformed the fourteenth amendment into a mean-

\textsuperscript{194} Colegrove v. Green, 328 U.S. 549, 556 (1946).

\textsuperscript{195} Barsky v. United States, 167 F.2d 241 (D.C. Cir.), \textit{cert. denied}, 334 U.S. 843 (1948); Keogh v. Neeley, 50 F.2d 685 (7th Cir. 1931); Hoxie School Dist. v. Brewer, 137 F. Supp. 364 (E.D. Ark. 1956); Butler v. Thompson, 97 F. Supp. 17 (E.D. Va. 1951); Oil Workers Int'l Union v. Elliot, 73 F. Supp. 942 (N.D. Tex. 1947). In the \textit{Hoxie} case the court held that school directors, threatened with force to compel rescission of their desegregation order, were entitled to invoke the guarantee clause and appeal to the federal courts for protection.

\textsuperscript{196} Schlesinger, \textit{The Politics of Upheaval} 250 (1960).

ingful restriction on the states which could be used by the national authority to limit certain types of abusive state governance. Second, the words, "equal protection of the laws," were broadly construed to prohibit numerous kinds of unconscionable discrimination, including state enforced segregation. The national government was thereby enabled to intervene in the interests of protecting any person from such abusive governance.

However, in rejecting the guarantee clause as a useful tool, the Court apparently failed to consider the long term consequences of its repudiation of that broader provision. For while the fourteenth amendment has managed to assume most of the burdens of section 4, it has been incapable of assuming them all. This will become obvious if we briefly review the lessons of history with respect to the meaning of "republican."

III. WHAT IS "REPUBLICAN"?

Section 4 assures the people of each state that the United States will guarantee them republican government. However, to further define the present scope of this obligation, the nature and substance of such government must be ascertained with some measure of exactitude.

At this point, it can be safely generalized that historically a republican government was deemed one that rested on the consent of the people. This consent was evidenced by their participation, either mediately or remotely, in the control of governmental processes. Further, such government was considered limited both by its own terms and by natural justice. In summation, republican government was viewed by the "founding fathers" as limited government, governing with the consent and control of those whose society it orders.

But the specific content imparted to these generalizations, as has been demonstrated by our historical survey, has changed from era to era. Was this legitimate, or should the specific content enforced on the states by the guarantee clause be determined solely by reference to those particular forms and standards deemed republican in 1787?

There are numerous defects in projecting that picture as the present standard of republicanism mandated by section 4. Initially, it cannot be conclusively presumed that all state governments were "republican" at the time of the Constitution's adoption. And even assuming they were republican at that time, is this suf-

199. See text accompanying notes 25 & 27 supra.
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sufficient reason to project their image on mid-twentieth century America? It would seem not, and there are a variety of good reasons to support this conclusion.

The first relates to one of the purposes of the guarantee clause. Foremost among its objects was protection of the people from abusive state governance. Surely the “founding fathers” realized that government which was sufficiently abusive to be considered unrepresentative in one era might be seen otherwise in another. Is not the dynamic content of “representative” clear from the fact that such government was deemed bound by “natural justice”\(^2\)?\(^2\) The latter concept is certainly not a static one, but rather tends to expand and contract through history. Second, is it not clear that the content of the enforced standard was at least to grow with the changing spirit of the federal government? The “founding fathers” apparently thought so, as they drafted the guarantee clause to insure a uniformity of governing spirit between the states and the national government.\(^2\)\(^1\)

As the historical survey demonstrates, such a dynamic interpretation of the standard embodied in section 4 is certainly not inconsistent with past judicial and congressional notions. Certainly the Court is predisposed toward such a construction, since “while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yields new and fuller import to its meaning.”\(^2\)\(^0\)\(^2\) Hence, in according specific content to “representative” government, we cannot be completely bound by the specific “interpretation which the framers, with the conditions and outlook of their time would have placed upon it.”\(^2\)\(^0\)\(^3\)

The substance of the obligation imposed by the guarantee must therefore be viewed not only in light of what the state governments were in 1787, and what they as well as the federal constitution have become since, but also in light of current concepts of the relation between the individual and the state, and his “rights” in a society of “ordered liberty.” As a result, no state government can be deemed representative unless it substantially conforms with contemporary notions of “natural justice.” This being so, the general historical mold of a republic as a limited government, resting on the consent of the people, will be filled by the specific content of

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\(^2\)\(^0\)\(^0\) See especially notes 62, 64, 65, 86 supra and accompanying text.
\(^2\)\(^0\)\(^1\) See note 44 supra.
\(^2\)\(^0\)\(^2\) Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring). Recall especially the general discussion in the introduction of this article, as well as the text accompanying notes 13 & 14 supra.
\(^2\)\(^0\)\(^3\) Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 443 (1934).
our day. In doing so there will be little regard for the purely formalistic or procedural modes utilized at the time the Constitution was adopted.

A keen sense of contemporary values will therefore be a minimum requisite for the performance of any judicial functions relating to the guarantee. But because of the historical standard within which the courts must operate, certain fundamentals will forever be deemed sacrosanct. Among such eternal requisites of republican government might be some sort of effective elections with a fairly large group of society participating therein, as well as some minimum limits on the power to deprive persons of life, liberty, and property.

Beside these more enduring requirements, others might be deemed essential in some eras and nonessential in others. For example, universal free public education, not a requisite to such government 150 years ago, must unavoidably be deemed so today. So also, the general right to choose one's occupation, while now essential to republican government, might not be 200 years hence. And of course, the more gradually change is pursued the more likely it will be deemed consistent with republicanism. Furthermore, regression in some areas, as in the control of the people over their government through elections, would likely be viewed with great suspicion.

In summary then, within the limits of the general historical standard, the specific substance of republican government will be dictated by contemporary values. Those values will not only include the present spirit of the national government, but also the current expectations of the American people. However, before any attempt is made to ascertain the specific authority which the guarantee confers on the federal government, the Court's position with respect to section 4 should be re-examined.

IV. THE COURT AND THE GUARANTEE

As previously noted, since 1912 the Court has denominated all issues raised under the guarantee nonjusticiable. This position is erroneous and should be modified. For in a proper case, no barriers, practical or otherwise, bar the judiciary from assuming its proper burden of enforcing section 4.

It should be stressed that Pacific Telephone presented an exceptional situation. In that case defendant sought to resist a statute on the grounds of its unrepulbic enactment. The Court's refusal of jurisdiction was tied to the severe consequences that might flow from an adjudication on the merits—the invalidation
of all or a large part of a state's legislation. But these unusual dangers were a product of the unique situation presented in *Pacific Telephone*. They could not arise, as the following discussion will illustrate, in almost any other kind of suit seeking to enforce the guarantee.

A judicial challenge to the republicanism of a particular state act or constitutional provision might be resisted on the grounds that it would demonstrate the un-republican nature of the whole state government. As a result, all its past actions would be void. But this logic must be rejected, since only the validity of the particular provision in question will be affected by a successful attempt to enjoin it or defend against its enforcement. The validity of other state acts would in no way be jeopardized.

But what of the consequences that might flow from an attempt to enforce the guarantee by resisting all state law on the theory that a lack of some republican attribute had rendered the state and all its prior acts illegitimate? The answer to such fears, however, is that under the doctrine of *de facto* government, all of a state's otherwise valid laws would be enforced. The *de facto* doctrine prevents the illegitimacy of a government from being used as a defense to the enforcement of its otherwise valid acts. Any fears of this sort expressed in *Luther* and *Pacific Telephone* are therefore groundless and unrealistic.

As this brief discussion demonstrates, the judicial enforcement of the guarantee clause could not lead to the invalidation of all of a state's prior acts, except in a case exactly like *Pacific Telephone*. As a result, no severe consequences militate against the assumption by the judiciary of this task. Certainly any inconvenience flowing from the invalidation of specific state acts is no ground for the Court's abstention here, as such results are indistinguishable from any other case.

But two other arguments are ventured as justifications for judicial abstinence under section 4. First, that although the Court might invalidate an un-republican provision, it could not force its proper replacement. An extreme illustration of the possible consequences which might flow from such an inability is a judicial declaration of the un-republican nature of a state's legislature which

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204. Baldy v. Hunter, 171 U.S. 388 (1898); Johnson v. Atlantic, 156 U.S. 618 (1895); Ketchum v. Buckley, 99 U.S. 188 (1879); Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873); Cook v. Oliver, 6 Fed. Cas. 412 (No. 3164) (C.C.S.D. Ga. 1870). Acts of the individual seceded states, through their legislatures, judiciaries, and executives, that were otherwise valid, were to be treated as binding notwithstanding the illegitimacy of those de facto governments.
would leave it without a law making body. Since the Court cannot itself affirmatively create a new one, it is argued that the Court should abstain in the first instance from any such adjudication.

But that argument fails by its misconstruction of the judicial process. By its very nature, the judicial process operates in a negative manner, constantly voiding arrangements that it could not affirmatively replace. It contemplates securing positive action from the parties themselves, or in their default, from the other branches of the government.

For this reason, judicial invalidation of state acts under section 4 would be no more serious than in other cases. In the previous example, the President and Congress would be expected to come to the judiciary's aid if a satisfactory replacement is not made. And, of course, an attempt to void a legislature as unrepresentative is a most extreme example. In most instances where the judiciary would be faced with the obligation of preserving republican government, it would be dealing with questions less central to the core of government function. This being so, the Court's inability to act affirmatively is no sounder an objection to its enforcement of the guarantee clause than any other provision of the Constitution.

However, a second objection should be noted. If the clause is enforcible by all the branches of the government in their respective spheres, it might be suggested that the judiciary should give conclusive weight to Congress' decision in the matter. This, in order to maintain a consistency of position among the departments and avoid friction. This logic, however, is not compelling. It is just as reasonable to assert that on this matter Congress should take its cues from the courts. Furthermore, no act of Congress can make constitutional that which is unconstitutional. 205

Congressional approval of state government that is not wholly republican is therefore not binding on the courts. This, even though that approval is accomplished by the use of powers exclusively within the domain of Congress. 206 For their exercise in no way precludes the Court from fulfilling its obligations in a particular case brought before it. As the Supreme Court said in Cohens v. Virginia:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by be-

206. Such as the power to seat senators and representatives and the power to decline the enactment of legislation.
cause it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which we would gladly avoid; but we cannot avoid them.²⁰⁷

Beside the previous objections to the judicial enforcement of the guarantee clause, three *raison d'êtres* of political question have been advanced.²⁰⁸ The most usual explanation is that the issue presented is relegated by the Constitution to the exclusive determination of the political departments. However, neither by language nor by implication is this true of questions raised under the guarantee clause. For its language, "The United States shall," clearly indicates that the burden of its enforcement rests on the *whole* federal government.

The second reason usually advanced to justify the denomination of an issue as political is similarly inapplicable here. It is asserted that the Court should refrain from any attempt to resolve a controversy where it lacks a sufficient standard to arrive at an appropriate decision. But as prior discussion has demonstrated, section 4 provides a workable criteria in the substance of the term "republican" and therefore does not suffer from this infirmity.

The last factor said to render a question political is also inapplicable here. Nowhere in the Constitution is there any intimation that section 4 was to be enforced solely by the electorate. Indeed, its enforcement by the ballot was just what the framers wished to avoid, since they desired the guarantee to be mandatory and to serve as protection against both majority and minority abuse. Any construction of that provision which rests its enforcement solely in the hands of a majority of the electorate would therefore be sheer folly.

Further, it should be recalled that section 4 was intended to insure substantial uniformity among all the state governments *inter se*, and between the states and the federal government. This, because significant substantive nonconformities were deemed dangerous to the survival and future of our federal system. Only a construction of section 4 that would enable the Court to enforce the provision's mandate would be consistent with any absolute determination to insure the realization of these goals. For while Congress and the electorate could act if they chose, there would be no

²⁰⁷ 19 U.S. (6 Wheat.) 264, 404 (1821).
way to force them to meet their responsibility. But historically, a court could always be made to act in a proper case, thus supporting the inference that it was to be able to enforce the guarantee. And certainly the Court should exercise that power, since as a practical matter the clause will never be enforced without its help.

In summary, there would seem to be no justifiable reason for judicial abstention under section 4 except in cases exactly like *Pacific Telephone*. The Court should therefore modify its view and lend its authority to the guarantee’s enforcement. For not only is its present abstention indefensible, but it effectively deprives numerous Americans of their birthright.

If the Court enforces section 4, it will insure the maintenance of state government that is consistent with contemporary notions of republicanism. Therefore, any subsequent enumeration of Congress’ specific powers under that provision will apply with equal force to the judiciary. That is, in proper cases and by judicial modes, the Court can force the states to do their duty. Here as elsewhere, its function would be primarily negative. For example, on a finding of unrepUBLICANISM, it could void any act attempting to abolish public schooling, or impose a poll tax. Although most affirmative action would necessarily be left to Congress, the guarantee clause might also enable the judiciary to force state officials to protect minority rights.209

However, if the Court adheres to its fifty-year tradition and refuses to enforce the guarantee, will it also abstain from reviewing congressional action thereunder? It will be recalled that it did so in two instances after the Civil War.210 But those cases are distinguishable. They can and should be limited to their facts.211 For judicial abstinence would give Congress unlimited power to impose on the states whatever government it deemed republican.

209. In proper cases and appropriate circumstances within judicial competence. As to the rights which are not covered by the fourteenth amendment, see text accompanying notes 214–26 infra.

210. See cases cited notes 137 & 138 supra.

211. They arose in the milieu of Reconstruction and therefore involved unique circumstances not likely to reoccur in American history. Had the Court rendered an adverse decision on the merits (as it had in *Dred Scott*), Congress would probably have impeached the Justices, or emasculated the Court’s jurisdiction. See *Ex parte McCord*, 73 U.S. (6 Wall.) 318 (1868); SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 324–26 (1954). The *Mississippi* case can easily be distinguished since it involved a suit against the President. The *Georgia* case can be confined to situations where “abstract questions of political power” and state sovereignty are sought to be litigated. See Massachusetts v. Mellon, 262 U.S. 226, 483, 485 (1923) (citing Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868)). No case besides the *Mellon* and *Stanton* cases, have ever even intimated that the Court would not review congressional action pursuant to art. 4, § 4.
Not only would such authority spell the complete end of our federal system, but it would also create an unchecked power capable of destroying rather than guaranteeing republican government.

For this reason, though the Court might refuse to enforce the guarantee on its own initiative, it would review the legitimacy of any congressional attempt to do so. In such a case, it would be only performing its usual function of keeping the legislature within those powers actually conferred, the “exclusive” power to enforce the guarantee remaining with Congress.

This conclusion finds vigorous support from the 1911 case of Coyle v. Smith,212 where the Court passed on the right of Congress to impose certain restrictions on an entering state, though the power to admit new states is exclusively vested in the legislature. It held that although such power belonged to Congress, the judiciary would review its exercise to insure that it was used constitutionally. Further, the Court also dismissed on the merits a contention that Congress could justify the challenged provision under the guarantee clause, thus providing a precedent directly in point.213

As a result, any congressional enforcement of the guarantee clause will be subject to judicial scrutiny. Despite this, that provision empowers Congress to enact a great deal of needed legislation from which it would otherwise be barred. The following discussion will therefore concentrate on its potential powers under that clause. But one should not forget the equally important function the Court might perform, if it chose to reverse its ill-advised abstinence.

V. CONGRESS AND THE GUARANTEE

Despite the tremendous growth of the fourteenth amendment, Congress has much more power under section 4 to protect Americans from abusive governance than it has under other provisions. For example, it can protect all fundamental rights from infringement by private parties. Can a state be deemed republican if it does not safeguard its citizens’ rights in fact, as well as law, from the transgressions of others?214 Should not the national government

212. 221 U.S. 559 (1911).
213. 221 U.S. 559, 566–68 (1911).
214. The federal government does safeguard its citizens’ rights in fact as well as in law. 18 U.S.C. §§ 241, 242 (1958); Rev. Stat. § 1979 (1871), 42 U.S.C. § 1983 (1958). Should not, therefore, the states be forced into substantive conformity with the federal government as the framers intended? And see note 65 supra for the Court’s view that “free republican governments,” by definition have an affirmative obligation to protect personal liberties against encroachment.
protect Americans against state government that leaves the regulation of their rights to private intimidation? Certainly, in light of contemporary theories of natural justice as well as public expectations, such a government must be deemed unrepublican. As a result, when a state fails in its affirmative duty to adequately protect these rights, that responsibility devolves on the national government. Even before such a failure, Congress would seem warranted in enacting measures “necessary and proper” to prevent it.215

There are two types of rights which are so fundamental that all republican states must protect them against private action, both in fact and in law. In the first group are those rights derived from the state constitution and laws. So, for example, a state must protect the following as granted under its law: the right to vote in state elections, the right to own property, the right to use public facilities, and the right to public benefits.

The second type of fundamental rights that the state has an affirmative duty to safeguard against private action, both in fact and law, are those without which a person could not live in this society. That is, past the implied obligation on the state to keep the peace, it must insure that each person has access to those things that are essential to his existence in our culture. Some things normally left to private control are so touched with a public interest that it becomes the state’s responsibility to see that they are not used discriminatorily. This, since such use will bar some people from obtaining access to the requisites of a full life in our society. And the number of things that are essential to such a full life grows as our culture becomes more complex.

Equal access for all to housing, employment, education, transportation and numerous other things, when sufficiently touched with a public interest, must therefore be assured and protected by the state. If it fails to do so, it may be deemed remiss in its obligation to provide republican government. This being so, Congress has the power under the guarantee clause to enact all measures “necessary and proper” to secure these interests, as well as the rights granted by state constitutions and laws.

In addition to its powers over national elections by virtue of article I, section 4, Congress may also regulate state elections in the interest of preserving the republican nature of their governments. That is, it may legislate to insure that all elections are fairly held, and that no person is deprived by unrepublican qualifica-

215. As noted in the introduction, the fourteenth amendment would not seem to go that far, since it requires “state action” for its application and seems to impose few affirmative duties on the state. See notes 2 & 5 supra.
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Congress therefore could not only prescribe the minimum requisites of the balloting procedure, but could also fix the maximum qualifications for electors. The latter power could be used not only to forestall or abolish particular requirements deemed unrepUBLICAN, but also to insure a sufficiently broad based electorate. By the same token, Congress could wipe out, as unrepUBLICAN, malapportionment and gerrymandering, as well as set the maximum term for public officers.

Any contention that Congress could not set the qualifications for state electors must be rejected. That argument stems from article 1, section 2, and the Seventeenth Amendment. Those provisions set requirements for voting in national elections. They established identical qualifications for national electors as those imposed by the states on the electors of the most numerous branch of the state legislature. This being so, it is maintained that the states were to be left free to fix the latter's qualifications. While this is true, it in no way conflicts with Congress' power to regulate those requirements in the interest of preserving republican government. The states were given a free hand so long as the United States found it unnecessary to intervene pursuant to its duty under article IV.

For this reason, Congress can use the guarantee clause to liberalize state voting requirements and thereby insure a broader based electorate. This is not to say that the "founding fathers" deemed universal suffrage a requisite of republican government. Far from it. They considered that a government would still be republican with a fairly limited and restrictive franchise, and indeed favored such at that time. They even sought to put popular control as far away from the governing process as they could. Nevertheless, it can fairly be inferred that they envisioned that the more popular control somewhere in the process, the relatively more republican a government would be.

When this general historical mold is filled with contemporary notions of "natural justice" and the rights of an individual in a society of "ordered liberty," Congress' power to abolish the poll tax in state elections seems clear. Further, with the addition of the

216. Note that the Fourteenth Amendment only bars "arbitrary or irrational" qualifications from being imposed, i.e., race or religion, but not, for example, property, residence, or educational qualifications. See Breedlove v. Suttles, 302 U.S. 277 (1937).


218. While the Fourteenth Amendment might apply to malapportionment, it would not apply to unconscionably long terms of office for some state officials. See note 8 supra.
strong presumption that should exist in favor of any congressional action enforcing the guarantee, there should be little doubt that it could also enact maximum qualifications for state electors. Such action would seem consistent with its encouragement of one of the concepts on which republican government rests—government by the consent of the governed. Also, by standardizing the qualifications needed to vote, Congress would be advancing the general purpose of the framers which was to secure substantial substantive uniformity among the state governments.

It might be contended that Congress could force the states to recognize all those rights enumerated in the Constitution that are not secured against their action by the fourteenth amendment. Among the most important of those would be the right to refrain from testifying against oneself in a criminal prosecution, the right to trial by jury in all criminal cases according to common law, the right to reasonable bail, and the right to be indicted by a grand jury. Admittedly, the fourteenth amendment substantively places on the states most of the civil rights restrictions that are placed on the federal government. In doing so, it is performing the function that probably would have accrued to the guarantee clause had the fourteenth amendment not been enacted. This, because the earlier provision was intended to secure citizens from abusive, hence unrepresnic, state governance. Equally as important, it was to exact from the state governments substantial conformity to the spirit of the national authority. Therefore, as the federal constitution was amended to protect the citizen against certain types of abusive national action, the guarantee correspondingly redefined the limitations on the states. And had the fourteenth amendment not been enacted, these limitations would have been raised successfully against state government by virtue of section 4. But that amendment made this unnecessary.

219. In addition to the usual presumption in favor of constitutionality, Congress might benefit in any test of its actions under § 4 from a further presumption grounded on its exclusive right to enforce that provision. The presumption created is, of course, rebuttable.
220. And thereby even modify or abolish residence or educational requirements in the interest of securing a broader based and hence more "republican" electorate.
223. See, e.g., CORWIN, CONSTITUTION OF THE UNITED STATES OF AMERICA n.1 (1953).
The remaining question, therefore, is whether those limitations on the federal government which are not applied to the states by the fourteenth amendment are of sufficient import to be regarded as essential to republican government? There would seem to be a presumption that they are only procedural and of a formalistic and insignificant nature. This results from the fact that the later amendment imposes on the states all of the restrictions that bind national action, save those that

are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people, as to be ranked as fundamental. . . ."

[And all those that are imposed are done so] in the belief that neither liberty nor justice would exist if they were sacrificed.226

This being so, the failure of the states to observe such limitations as inhere in the Bill of Rights, but which are not substantively applied to them, cannot be deemed unrepugnant. For those restrictions are not so fundamental as to inhere in the very nature of republican government. The lesson to be learned is that the fourteenth amendment doomed the future growth of the guarantee clause as a mode of applying to the states the important substantive restrictions on national action.

But it is still obvious, as the prior discussion well illustrates, that a substantial residuum of power inheres in the central government under the guarantee clause. For that clause places on the national government certain obligations which are not imposed by other parts of our fundamental law. More specifically, it obliges the federal government to use its authority to secure for all Americans a fuller realization of their political and civil rights. For only by the adequate protection and advancement of these rights can republican state government be achieved or preserved. The only force in our system capable of realizing this objective is the national government. Small wonder then, that the guarantee endowed it with such power.

VI. THE GUARANTEE AND THE FEDERAL SYSTEM

What would be the impact on our federal system of such a conscientious enforcement of the guarantee? Would we destroy the virtues of federalism? Cure its evils? Would such an enforcement move us towards a unitary state?

The virtues of our federal system are deemed numerous. It is said that composed of relatively autonomous units, the federal

system is valuable as a safeguard against possible \textit{coups d'etat}, as a quarantine against sociological diseases, and as a device for separating local from national political issues which are better considered apart. Such a system also permits administration on a more workable scale, adaption of legislation and regulation to local needs, creation of laboratories for social experimentation, and the training of the populace in self-government on a more immediate and understandable basis.\footnote{Benson, \textit{The New Centralization} 21 (1941).}

This superficial summary of some of the alleged benefits of federalism is not meant to provide anything more than a brief synopsis upon which to base the following discussion. What would a rigorous and expansive enforcement of section 4 do to the positive values inherent in our federal system?

The short answer would seem to be that it would impair them only slightly, if at all. This, because section 4 can only be used to safeguard those fundamental values that we deem too important to be left to the whim of the various states. Admittedly these values have grown both in number and scope. As a result, the national authority might interfere a great deal in the internal governance of the states.

But as was noted earlier, such intervention would be warranted solely to protect citizens' rights, and maintain that degree of limited self-government that contemporary society demands. The states therefore continue sovereign in their respective spheres so long as they do not impinge on the substance of those overriding values. This being so, it is hard to see how the virtues of a federal system would be injured by a rigorous enforcement of section 4. Surely they would be circumscribed, but only by the advancement of those values deemed too important to be left to local determination. Such advancement in nowise spells the demise of state government. The states would still be self-governing autonomous units, handling local problems, and supreme in their own sphere. The fact that an enforcement of the guarantee might restrict their action in some areas would seem no more destructive of the federal system's positive values than are the limitations imposed by the fourteenth and fifteenth amendments. Can they too be said to destroy the virtues of federal government? Or do they, as well as the guarantee, preserve and advance such virtues, save under those limitations we deem so essential that no state ought to have the power to infringe them?

The net result of a constitutional exercise of section 4 power would be more vibrant and effective state government, with an
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intensifying of the values to be derived therefrom. This, because the more responsible and representative a state government becomes, the more it fulfills the expectations of the federal system. National intervention to secure these objectives would bolster the ability of local government to ascertain, and thereby insure, the advancement and protection of permissible local values. It would also assure better handling and resolution of state problems through a more adequate expression of local opinion and feeling. And it might conduce to a greater feeling of unity and contentment with state government, thereby strengthening it as a bulwark against federal usurpation and the dangers of autocracy. Further, national intervention could secure broader popular consent, or at least acceptance of social experimentation undertaken by the state, as well as provide more of the people with a first hand opportunity to gain a meaningful participation in government. Such broad based local control as would result from an enforcement of the guarantee might also foster a desire in the mass of the people to have local problems administered locally, instead of giving them up to the national government where their control would be more remote.

It is difficult to conceive of injury resulting from federal protection of individual rights which are deemed basic to republican government. The states' capacity to function in those areas deemed by our federal system properly within their unreviewable aegis would in no way be weakened. To argue that such federal action would encroach on areas of traditional "state's rights," is only to highlight the inescapable fact that a federal union involves a delicate balance which is ever in a flux and process of adjustment. A conscientious and rigorous enforcement of the guarantee would not destroy federalism and its attendant virtues, but only adjust the delicate balance of powers that any such system involves. And that adjustment, by virtue of an enforcement of section 4, would solely be one of recognizing the paramount national concern with certain matters, and the attendant power of the federal government to deal with them.

It would therefore seem extremely desirable to resurrect the guarantee as an instrument of national government. The salutary results that could be obtained from an application of its principles would greatly enhance the solution of many contemporary problems. Most of all, by curing the deficiencies of the fourteenth amendment, it would insure the fuller realization for all Ameri-

228. Racial and religious discrimination are obviously not "permissible local values," as attested to by the spirit of the fourteenth and fifteenth amendments.
cans of those basic precepts upon which our society rests. In the words of the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .